Supreme Court, U.S.
FILED
04 595 NOV 1 2004
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

JOHN ANTHONY MCNICHOLL,
Petitioner,

v.

JOHN ASHCROFT, ATTORNEY GENERAL,
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL P. MCELHATTON, ESQ.
Counsel of Record
MCELHATTON DARREFF
& SHIELDS, P.C.
MELLON BANK CENTER
1735 MARKET STREET, 43RD FLOOR
PHILADELPHIA, PA 19103
(215) 564-5111
(215) 564-5115
Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED

I. The decision of the Third Circuit is flawed and inconsistent with current Third Circuit law.

II. The Third Circuit should have considered Petitioner's case on the merits and not have dismissed due to lack of jurisdiction.

III. Both the Immigration Judge and the Board of Immigration Appeals incorrectly interpreted and applied statutory law.

IV. After Petitioner established that if he were to be deported to Northern Ireland he would be subject to persecution, the Board of Immigration Appeals failed to properly apply the regulatory presumption of a well founded fear of persecution.

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the case caption.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINION BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

REASONS FOR GRANTING THE WRIT 3

STATEMENT OF THE CASE 5

STATEMENT OF FACTS 7

ARGUMENTS:

I. The decision of the Third Circuit is flawed and inconsistent with current Third Circuit law 9

II. The Third Circuit should have considered Petitioner's case on the merits and not have dismissed due to lack of jurisdiction 10

III. Both the Immigration Judge and the Board of Immigration Appeals incorrectly interpreted and applied statutory law 13

IV. After Petitioner established that if he were to be deported to Northern Ireland he would be subject to persecution, the Board of Immigration Appeals failed to properly apply the regulatory presumption of a well founded fear of persecution 19

CONCLUSION 20

APPENDIX

Appendix A
Order of the United States Court of Appeals for the Third Circuit Denying a Panel Rehearing, Dated August 3, 2004 . . . . . 1a

Appendix B
Decision of the United States Court of Appeals for the Third Circuit Granting Motion to Reinstate the Appeal and Granting Motion to Dismiss for Lack of Jurisdiction Dated June 4, 2004 . . . . . 3a

Appendix C
Order of the United States Court of Appeals for the Third Circuit Terminating Petition to Review Dated March 15, 2004 . . . . . 5a

Appendix D
Decision of the Board of Immigration Appeals Dated July 10, 2003 . . . . . 7a

Appendix E
Decision of the Immigration Court Dated May 15, 2001 . . . . . 19a

Appendix F
Decision of the Board of Immigration Appeals Dated September 8, 2000 . . . . . 28a

Appendix G
Decision of the Board of Immigration Appeals Dated June 7, 2000 . . . . . 33a

Appendix H
Decision of the Immigration Court Dated September 9, 1999 . . . . . 37a

TABLE OF AUTHORITIES

Cases

Bejar v. Ashcroft, 324 F.3d 127 (2003) 10

Mohamed v. Ashcroft, 93 Fed. Appx. 450 (2004) . . 10

Rasul v. Bush, 2004 wl 1432134 . . . . . 11, 13

Ex Parte Milligan, 4 Will. 2, 18 L.Ed 3 (1942) . . . 12

In Re: Yamashute, 327 U.S. 1, 66 S. Ct. 340 (1946) 12

Statutes

8 U.S.C. §1182(a)(3)(B); [Section 212] . . 3, 16, 17, 18
8 U.S.C. §1182(a)(3)(B)(i)(I); [Section 212] 1, 13
8 U.S.C. §1182(a)(3)(B)(iii); [Section 212] 2, 13
8 U.S.C. §1182(a)(3)(B)(iv); [Section 212] 2, 14, 16, 17, 18
8 U.S.C. §1182(a)(3)(B)(vi); [Section 212] . 2, 14, 18
8 U.S.C. §1189(a)(1)(B); [Section 219] 3, 14, 15, 17, 18
8 U.S.C. §208.13(b)(1)(i) 3, 4, 19
8 U.S.C. §1105a(c) 9, 10
8 U.S.C. §1252 . . . . . 1, 9, 10

OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit was entered on June 4, 2004, under the caption of McNicoll vs. Ashcroft (unplublished). There was no decision by the Court to support its actions on the lack of jurisdiction. Petitioner file a timely Petition for Panel Rehearing. The Petition for Rehearing was denied on August 3, 2004. The order is attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on June 4, 2004. The Third Circuit Court of Appeal has jurisdiction over this matter under 8 U.S.C. §1252 as there had been a final adjudication on the merits by the Board of Immigration Appeals on July 10, 2003. The former Immigration and Naturalization Service commenced removal proceedings because Petitioner had entered the United States without inspection.

This Petition for Writ of Certiorari has been filed and docketed within the time limits prescribed as it was mailed on November 1, 2004 which is within 90 days of the date of the Order on the Petition for Review. Thus, the jurisdiction of the Court is properly invoked.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

8 U.S.C. §1182(a)(3)(B)(i)(I)

> Terrorist activities.
> (i) In general. Any alien who—
> (I) has engaged in a terrorist activity.

8 U.S.C. §1182(a)(3)(B)(iii)

Terrorist activity defined. As used in this Act, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State)...

8 U.S.C. §1182(a)(3)(B)(iv)

Engage in terrorist activity defined. As used in this chapter [Act], the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization-

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;...

8 U.S.C. §1182(a)(3)(B)(vi)

Terrorist organization defined. As used in clause (i)(VI) and clause (iv), the term "terrorist organization" means an organization—

(I) designated under section 219 [8 U.S.C. §1189];

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General, as a terrorist organization, after finding that the organization engages in the activities described in subclause (I), (II), or (III) of clause (iv), or that the organization provides material support to further terrorist activity; or

(III) that is a group of two or more individuals, whether organized or not, which engages in the activities

described in subclause (I), (II), or (III), or clause (iv).

8 U.S.C. §1189(a)(1)(B)

In general. The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that—the organization engages in terrorist activity (as defined in section 212(a)(3)(B) [8 U.S.C. §1182(a)(3)(B)] or terrorism...

8 U.S.C. §208.13(b)(1)(i)

> "If it is determined that the applicant has established past persecution, he or she shall be presumed also to have a well-founded fear of persecution unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant's country of nationality or last residence have changed to such and extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return."

REASONS FOR GRANTING THE WRIT

I. The Third Circuit Court of Appeals has never considered the actions of this case on the merits. While Petitioner had a hearing before the Immigration Court, and the Board of Immigration Appeals reviewed the Immigration Judge's decision, Petitioner has not had any judicial review of the underlying case. Petitioner asserts that there were errors in both the Immigration Judge's and then the Board's interpretation of statutory law, misapplication of case law and an abuse of discretion in applying the facts. Petitioner asserts that it was error for the Third Circuit to both reinstate Petitioner's appeal upon petition after the untimely filing of a

Brief, and then to dismiss Petitioner's appeal on that same day for lack of jurisdiction given that Petitioner had been deported. Petitioner therefore has a right to be heard, without a judicial outlet for effectuating this right.

II. The Immigration Judge incorrectly found that Petitioner could be excluded from the United States as an alien as he had engaged in terrorist activity as a member of the Irish National Liberation Army in the early 1970. The Board of Immigration Appeals affirmed this ruling despite acknowledging that the Irish National Liberation Army has never been designated as a terrorist organization by the Secretary of State as required by the Immigration and Nationality Act. Because the Third Circuit incorrectly dismissed the case on jurisdictional grounds, Petitioner has been unfairly labeled a terrorist without the ability of having judicial review of that decision. In this world climate of catching and persecuting those labeled "terrorist", it is inconceivable that an individual could be arrested and deported for engaging in terrorism when his actions are outside of the parameters of the laws of these United States; for a court to rule that the individual can appeal that decision, but then for that same court to rule that it will not hear the appeal.

III. The Third Circuit Court of Appeals has failed to grant, in any substantive way, a review of Petitioner's claim for relief from deportation. Petitioner asserts that he established a pattern of past persecution and was entitled to the well-founded fear of future persecution. 8 U.S.C. §208.13(b)(1)(i). In the instant case, at the very least, there is sufficient doubt whether the Board gave Petitioner the benefit of the presumption where it was found that the Petitioner established past persecution. The Board never reviewed this in their decision and never established that the Government

established by preponderance of the evidence that the presumption had been overcome. Consequently, the Third Circuit should have reviewed the case and determined whether or not to reverse or remand the case to the Board to give the Agency an opportunity to address the presumptions.

STATEMENT OF THE CASE

Petitioner was charged in an Order to Show Cause in a deportation proceeding on March 13, 1997. Initially, Petitioner was charged as an alien who had entered the United States without inspection. Thereafter the charges were expanded in two superseding charging documents to include fraud and terrorism. Specifically, besides the charge of entering the United States without inspection, Petitioner was charged with entering into the United States by willfully misrepresenting a material fact, and with two charges of engaging in terrorist activity. Petitioner's wife, who is a United States citizen, filed and had approved, a petition to classify Petitioner as a "non quota" immigrant.

Extensive hearings were held before an Immigration Judge in Philadelphia, Pennsylvania. On September 9, 1999, the Immigration Judge denied the Petitioner's Motion for Termination and found that the record supported the charges of deportability and certified the Record to the Board. The Immigration Judge had bifurcated the case, however, and had not ruled on Petitioner's request for relief from deportation. On June 7, 2000, the Board declined to review the case "in a piecemeal fashion" and remanded the record to the Immigration Court.

Additional hearings were held, and the Immigration Judge issued a final order on May 15, 2001. Within the body of that decision, the Immigration Judge found that because Petitioner

was found to have engaged in terrorist activity, he was precluded from qualifying for an adjustment of status, and would be denied all other relief other than the relief of deferral of removal. The Immigration Judge deferred deportation as to the United Kingdom of Great Britain and Northern Ireland finding that Petitioner had established that it was more likely than not that he would be tortured if removed to the United Kingdom of Great Britain and Northern Ireland. The Immigration Judge ordered, however, the Petitioner to be deported to the Republic of Ireland and found that the Petitioner would not likely face torture in the Republic of Ireland.

Timely appeal was taken by the Petitioner to the Board of Immigration Appeals addressing the Immigration Judge's decision of May 15, 2001 and his earlier decision of September 9, 1999. Concurrently, the Department of Homeland Security (DHS), formerly known as Immigration and Naturalization Service (INS), timely appealed the Immigration Judge's grant of relief under the Convention Against Torture. On July 10, 2003, the Board denied Petitioner's appeal and dismissed it. The Board granted the DHS/INS appeal and reversed the grant of relief under the Convention Against Torture.

A Petition to Review the Board's final order was filed by Petitioner with the Third Circuit Court of Appeals. A Stay of Deportation was sought, which the Third Circuit denied without a full review of the case on the merits. Petitioner was then immediately deported to the Republic of Ireland.

Petitioner's appeal to the Third Circuit of the Board's July 10, 2003 decision was procedurally terminated on March 15, 2004 due to Petitioner's former counsel's failure to timely file a Brief and Appendix. On March 25, 2004, Petitioner filed

a Petition to Reinstate the Appeal. On April 15, 2004, DHS/INS filed a Motion to Dismiss for lack of Jurisdiction as Petitioner had been deported to the Republic of Ireland. Petitioner filed a timely reply. On June 4, 2004, the Third Circuit issued an Order granting Petitioner's Motion to Reinstate the Appeal but granting DHS/INS Motion to Dismiss for lack of Jurisdiction. Petitioner filed a timely Petition for Panel Rehearing, which was denied by the Third Circuit on August 3, 2004.

STATEMENT OF THE FACTS

Petitioner John Anthony McNicoll was born in Northern Ireland and then migrated to the Republic of Ireland before immigrating to the United States. He is married and he and his wife are the parents of four children who were all born in the United States of America and are consequently American citizens.

The underlying allegations against Petitioner was that he was involved in a incident in Dungiven, Northern Ireland on July 22, 1975. During the course of that incident, an Officer McPhearson of the Royal Ulster Constabulary (RUC) was killed and another RUC Officer was wounded. While the wounded officer identified Petitioner as the shooter, it appears from the record that another person was prosecuted and convicted as the shooter in that incident. Petitioner McNicoll has at all time denied complicity in the shooting incident.

On February 16, 1976, Petitioner was detained by the British Army and RUC Officers and taken to Coleraine Barracks, where he was threatened, intimidated and thoroughly beaten before charges were made against him. Petitioner was then transferred to her Majesty's Prison Maze and was classified as a "political prisoner". During this

period of time, this prison was the principal facility used for incarceration of political prisoners involved in the sectarian dispute in Northern Ireland. Prisoners in the Maze Prison were either, according to the Immigration Judge, designated as Catholic nationalist or Protestant loyalist. The Petitioner was housed in a wing with alleged members of the Republican Contingent known as the Irish National Liberation Army (INLA).

In May 1976, ten detainees in the INLA wing tunneled out of the prison and nine escaped. The Petitioner was one of the nine that escaped. The Petitioner did not and never did contest the facts of his arrest or the political nature of the arrest, prosecution and incarceration in Northern Ireland. He did, however, contest the allegation of his participation in the incident at Dungiven and his alleged status as a member of a proscribed organization.

In 1976, Petitioner fled to the Republic of Ireland. Petitioner entered the United States of America in 1984 with his wife. In 1989, Petitioner's wife became eligible for an immigrant visa. In January of 1990, Petitioner applied for a visa based on his relationship to his wife. Within the body of the application, Petitioner stated he had never been arrested or confined in prison.

Since his entry into the United States, Petitioner has worked as a union pipe fitter and has lived with his wife and four children in their suburban Philadelphia home without incident.

At 5:30 a.m. on the morning of July 18, 2003, after Petitioner's Motion to Stay deportation was denied by the Third Circuit Court of Appeals, Petitioner was arrested in front of his home on his way to work and summarily deported

to the Republic of Ireland. Petitioner's wife had previously filed a petition to classify Petitioner as a "non quota" immigrant.

ARGUMENT

I. The decision of the Third Circuit is flawed and inconsistent with current Third Circuit law.

By decision dated June 4, 2004, the Third Circuit issued an Order granting Petitioner's Motion to Reinstate his appeal and simultaneously granted DHS' Motion to Dismiss for Lack of Jurisdiction. This decision had the inconsistent result of granting Petitioner the right to bring an appeal of the Board of Immigration Appeals' decision affirming his exclusion as an alien, but then denying him a forum in which to act. The Court's decision had the result of denying to Petitioner his due process right to be heard after the Court had granted him such a right.

Importantly, the Third Circuit based its decision to grant the Motion to Dismiss for Lack of Jurisdiction on the fact that Petitioner had been previously deported. This decision was in error.

Prior to April 1, 1996, a Petition to Review an order of deportation stayed execution of the order. If, however, the alien had been deported, the Petition to Review would be barred. 8 U.S.C. §1105a(c), which precluded review of matters where the alien had been removed, was repealed by the Illegal Immigration Reform & Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 1570 (IIRIRA). Currently, 8 U.S.C. §1252, under which the Circuit Court has jurisdiction, contains no such prohibition precluding review.

In the case of Bejar v. Ashcroft, 324 F. 3d 127 (2003), the Board of Immigration Appeals held that it lacked jurisdiction to hear petitioner's appeal as the petitioner had departed[1] from the United States. The Third Circuit held that given the amendment to 8 U.S.C. §1252(a) by IIRIRA, the deportation of an alien was not a preclusion to review.[2] It is therefore clear, from a reading of current case law from the Third Circuit, that the Third Circuit erred in finding that it lacked jurisdiction to consider Petitioner's appeal based exclusively on his deportation.

II. The Third Circuit should have considered Petitioner's case on the merits and not have dismissed due to lack of jurisdiction.

As has previously been stated, Petitioner was originally charged as an alien who had entered the United States without inspection. Thereafter, the charges were expanded in two superseding charging documents to include fraud and terrorism. While Petitioner did have an opportunity to present his case before the Immigration Judge, he disputed the Judge's

---

[1] While the Board stated that petitioner had departed from the United States, the record makes clear that the petitioner had been forcibly removed from the United States by INS.

[2] The Third Circuit reached a similar finding in the unpublished opinion of Mohamed v. Ashcroft, 93 Fed. Appx. 450, 2004 U.S. App. LEXIS 6664. In that case, Mohamed, who had filed a petition to review the order of the Board of Immigration Appeals denying his petition for relief from removal, was deported to Egypt. The Third Circuit held that Mohamed's removal to Egypt prior to action on his petition to review, did not oust the court of jurisdiction. The Court specifically found that 8 U.S.C. §1105a(c), which previously precluded jurisdiction when an alien had been deported, had been repealed by the IIRIRA.

order finding that he was excludable under the Immigration and Nationality Act due to misrepresentation and his engaging in terrorist activities while in Northern Ireland. An appeal was taken to the Board of Immigration Appeals which ultimately affirmed the Judge's findings regarding deportability. While Petitioner filed a Petition to Review with the Third Circuit, this Petition was dismissed before the case was ever subjected to judicial review. Pursuant to the Third Circuit's June 4, 2004 decision, the deportation of Petitioner negates the possibility of Petitioner ever receiving judicial review of his case. Petitioner asserts that this is a violation of his due process rights.

The United States Supreme Court recently addressed a similar issue in Rasul v. Bush, 2004 wl 1432134 (2004). The issue in Rasul v. Bush was whether foreign nationals located outside the borders of the United States but within the custody and control of the government of the United States of America are "beyond the jurisdiction of the federal courts". While the Rasul Court was dealing with relief under the Habeas statute, the fundamental jurisprudential concept is the same in this case. The "privilege of litigation" was initially offered by our Courts through the exercise of the right to have an appeal on the merits reviewed by the Court of Appeals. Because of the failure of Petitioner's previous counsel to file his Brief in a timely manner, there was no such "privilege of litigation" in our judicial system. In addition, all the agencies making the determination of whether Petitioner is entitled to any form of relief were executive branch agencies. Never has the judicial branch reviewed the merits of the case. While Petitioner did file a Motion for Stay of Deportation with the Third Circuit, that review was limited, however, and did not afford the full benefit of independent judicial scrutiny of the case.

Access to the courts of the United States must not be denied in these circumstances. Although Petitioner is currently outside the physical boundaries of the United States, Rasul recognized that in habeas circumstances, such individuals were entitled to the power of the federal courts to review situations of detention. Petitioner was taken from the street in front of his home by federal agents, forcibly removed from that location, transported to an airport and compelled to get on an airplane to the Republic of Ireland. His wife and four children (all American citizens) were unaware of the circumstances of his detention until some time later. Petitioner remains unable to return to the United States because of the Executive detention and banishment. See Ex Parte Milligan, 4 Will. 2, 18 L Ed3 (1942): In Re: Yamashute, 327 U.S.1, 66 S. Ct. 340, 90 L.Gd. 499 (1946).

An examination of the language of Rasul in which the Court sets forth the precise question is illustrative:

> The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive Detention of aliens in a territory over which the United States exercise plenary and exclusive jurisdiction, but not "ultimate sovereignty"

Rasul, id. at p.8

As the opinion of Justice Stevens articulates, the answer is clearly in the affirmative. Non-resident aliens in the exclusive control of the Executive are entitled to judicial review.

In this case, the question can properly be phrased as follows:

The question before the Court is whether the right to appeal a decision of the Board of Immigration Appeals (statutorily created entity) is a right which confers an obligation for judicial review when sought by a Petitioner who has been removed from the United States of America against his will.

Petitioner submits that under these circumstances and under the rationale of Rasul, there should be an opportunity for judicial review. To establish an inflexible jurisdiction rule which is applied without regard to the facts and circumstances of Petitioner's case is to put form before substance, to articulate rights but deny the availability of those rights to someone who seeks to invoke those rights.

III. Both the Immigration Judge and the Board of Immigration Appeals incorrectly interpreted and applied statutory law.

Petitioner was charged under former section 241(a)(1)(A) of the Immigration and Nationality Act as being an alien deportable from the United States as one who has engaged in a terrorist activity under section 212(a)(3)(B)(i)(I) of the same Act. Said section of the Act defines terrorist activities as an alien who has engaged in a terrorist activity.

Petitioner was also charged under former section 241 (a)(4)(B) of the Immigration and Nationality Act as being an alien deportable from the United States as one who may have engaged in any terrorist activity as defined in section 212(a)(3)(B)(iii) of the same Act. Said section of the Act defines terrorist activity as any activity which is unlawful under the laws of the place where it is committed.

In attempting to define what it means to have "engaged" in terrorist activity, one must look to section 212(a)(3)(B)(iv) of the Act; 8 U.S.C. §1182(a)(3)(B)(iv). Said section of the Act clearly states that either in an individual capacity or as a member of an organization, one must have committed, or attempted to commit, a terrorist activity under circumstances indicating an intention to cause death or serious bodily injury. The individual or organization may have also planned a terrorist activity or gathered information on potential targets for terrorist activity.

In the instant case, it has at all times been alleged that Petitioner has engaged in terrorist activity as a member of an organization; specifically, the INLA. At no time has the government sought to allege that Petitioner engaged in terrorist activity in an individual capacity. Because Respondent has exclusively alleged that Petitioner has engaged in terrorist activity as a member of an organization, it had the burden of demonstrating as a condition precedent to a finding of exclusion based on terrorist activity, that the organization to which Petitioner is alleged to have operated, has been designated as a terrorist organization. This is a statutorily mandated requirement.

8 U.S.C. §1182(a)(3)(B)(vi) defines a terrorist organization as one designated as such under section 219 [8 U.S.C. §1189] of the Act. Section 219 of the Act states that it is the Secretary of State who is authorized to designate an organization as a foreign terrorist organization if the Secretary finds that the organization engages in terrorist activity or terrorism. In the instant action, the Secretary never designated the INLA as a terrorist organization despite ample opportunity to do so.

Section 219 of the Act further states that a terrorist organization may be designated as such upon publication in the Federal Register by the Secretary of State in consultation with or upon the request of the Attorney General. The name of the INLA has never been published in the Federal Register, and there is no indication that the Attorney General has ever requested that the Secretary of State ever list this organization in the Federal Register.

While Section 219 also states that a Terrorist Organization may be composed of two or more individuals who may not be part of an organization, Respondent has never provided the names of any other individuals with whom Petitioner has been conspiring. It has always been alleged that Petitioner was a part of the faceless INLA. As such, it must have been demonstrated that the INLA was designated a terrorist organization by the Secretary of State.

In its July 10, 2003 opinion, the Board of Immigration Appeals provides several disingenuous arguments as to why it was not necessary for the INLA to be designated as a terrorist organization by the Secretary of State. Each argument utilized is in contradiction to the Act.

Throughout the pendency of this case, both the Immigration Judge and DHS acknowledged that Section 219 of the Act gives authority to the Department of State to designate an organization as a terrorist organization. The Board of Immigration Appeals concurred with this assessment. The Board further affirmed, however, the Immigration Judge and DHS' contention that section 219 of the Act does not divest the Attorney General of the authority to determine whether an alien is deportable under the Act. (Appendix D, BIA, p. 11a) This argument is without merit, and does not address the issue at hand. Petitioner has never

argued that the Attorney General does not have authority to determine if an alien is deportable. This argument would be contrary to the Act itself. Instead, Petitioner argues that if an individual is to be deported as an alien who has been involved in terrorist activity as part of an organization, that organization must be designated as a terrorist organization by the Secretary of State. If the organization has not received such a designation, then that individual cannot be excluded from the United States under that particular theory of law.

The Board of Immigration Appeals next argued that the institution of immigration proceedings and a determination of whether an alien is excludable pursuant to section 212(a)(3)(B) of the Act does not involve the designation of an organization as a terrorist organization. As an example of this contention, the Immigration Judge utilized the situation whereby an alien is excluded who commits a terrorist act in an individual capacity without the involvement of an organization. This argument again failed to address the issue at hand. Section 212(a)(3)(B) of the Act states that an alien who has engaged in terrorist activity is ineligible for admission into the United States. While this section of the Act does not mention the necessity of having an organization designated as a terrorist organization before an alien can be deemed inadmissible, section 212(a)(3)(B)(iv) brings the issue more into focus. Section 212(a)(3)(B)(iv) defines the term "engage in terrorist activity" as utilized in section 212(a)(3)(B). Section 212(a)(3)(B)(iv) defines the term "engage in terrorist activity" as a series of acts committed by an alien either in an individual capacity or as a member of an organization. These activities include committing a terrorist activity under circumstances indicating an intention to cause death or serious bodily injury, planning a terrorist activity or gathering information on potential targets for terrorist activity. Therefore, an alien can be excluded if he has engaged in

terrorist activity as an individual, and an alien can be excluded for engaging in terrorist activity as part of an organization. In the instant case, there has never been any allegation or evidence produced that Petitioner ever engaged in terrorist activity in an individual capacity. DHS/INS has always maintained that Petitioner was engaged in terrorist activity as part of the INLA. Because the government's case rested on showing that Petitioner was involved in terrorist activity as part of an organization, it had an altered standard of proof than if it had merely shown that Petitioner was engaged in terrorist activity in an individual capacity. It was necessary to show that the organization through which Petitioner was alleged to have engaged in terrorist activities, was designated as a terrorist organization by the Department of State. To hold otherwise would be to render section 219 of the Act meaningless. The Board therefore committed error in dismissing Petitioner's appeal.

The Board of Immigration Appeals next infers that because section 212(a)(3)(B)(iv) of the Act only refers to the term "organization" without qualifying that the organization be a "terrorist organization" that section 212(a)(3)(B)(iv) is not controlled by section 219 of the Act and its requirement that a terrorist organization be so designated by the Secretary of State. (Appendix D, BIA, p. 12a) This painful interpretation of the Act strains credibility. Section 219 of the Act clearly states that the Secretary is authorized to designate an organization as a terrorist organization if that organization engages in terrorist activity as defined in section 212(a)(3)(B) of the Act. For an actual definition of "engage in terrorist activity" as utilized in section 212(a)(3)(B), you must utilize section 212(a)(3)(B)(iv) of the Act. It is therefore obvious that the legislators intended that the requirement of a designation of a terrorist organization by the Secretary of

State in section 219 of the Act covered the "organization" listed in section 212(a)(3)(B)(iv) of the Act.

Finally, in denying Petitioner's appeal, the Board of Immigration Appeals argued that an organization may engage in terrorist activity under section 212(a)(3)(B) of the Act before it can be designated as a terrorist organization by the Department of State. The Board appears to infer that because there is a time lag before which the Department of State can act upon the activities of a group, the Attorney General can proceed in deporting an individual as a member of a terrorist organization during this period. This argument again has the effect of attempting to negate the intent and purpose of section 219 of the Act. It is obvious that there must be an activity before there can be a determination that that unlawful activity took place. Anything else would be purely speculative. But there must be action taken once knowledge of the unlawful activity is received. In the instant action, an Order to Show Cause was issued in 1997, extensive hearings were held in this case in 1999, appeals were taken and Briefs were written by DHS up through 2004. It is therefore evident that if the Department of State had evidence that the INLA was involved in terrorist activity, it had ample opportunity to provide such a designation. More importantly, section 212(a)(3)(B)(vi) of the Act states that an organization can be designated as a terrorist organization upon publication in the Federal Register by the Secretary of State upon the request of the Attorney General. If the Attorney General therefore felt that the INLA was a terrorist organization, it has had almost seven years from the inception of this case to request its designation as such. The result of this action is that Petitioner has been designated as a terrorist for his alleged involvement in the INLA when the INLA has never been designated, contrary to the dictates of the Act, as a terrorist organization. Because of this unlawful designation, Petitioner is ineligible for admission

into the United States where his children and wife are citizens, and is unable to have his status altered. Even more egregious, all of this has occurred without the possibility of judicial review.

IV. After Petitioner established that if he were to be deported to Northern Ireland he would be subject to persecution, the Board of Immigration Appeals failed to properly apply the regulatory presumption of a well founded fear of persecution.

Evidence of past persecution can establish a well-founded fear of future persecution. Establishing past persecution, as Petitioner did in the instant case, triggers a rebuttable presumption of a well-founded fear of future persecution. 8 U.S.C. §208.13(b)(1)(i). DHS can overcome this presumption by showing by a preponderance of evidence that conditions "have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return. In order to conclude, on the basis of changed country conditions, that an applicant's fear is no longer well-founded, the BIA must engage in an individualized analysis that demonstrates that changed conditions have eliminated the basis for the Petitioner's individual fear of future persecution.

In the instant action, the Immigration Judge found in his May 15, 2001 decision, that while conditions in Northern Ireland had changed, reforms in policing and criminal justice were not yet complete. It was therefore possible that Petitioner would be subject to torture at the hands of the police. In overturning the Immigration Judge's granting of deferral of deportation to Northern Ireland, the Board of Immigration Appeals stated that any occasional abuse that Petitioner might endure at the hand of police officers in

Northern Ireland would not rise to the definition of "torture". The Board also stated that Petitioner failed to show that he was more likely than not to be tortured if returned to Northern Ireland.

The Board never gave Petitioner the presumption of a well-founded fear. The Board never stated that the government had established by a preponderance of the evidence that the presumption had been overcome by changed country conditions. Because it is not clear whether the Board applied a presumption of a well-founded fear, remand was appropriate. Because, however, Petitioner's case has never been subjected to judicial review, this issue has not been addressed.

CONCLUSION

In conclusion, the claims raised in this petition establish that the Third Circuit incorrectly dismissed Petitioner's petition on the ground that it lacked jurisdiction as Petitioner had been deported. The Third Circuit had jurisdiction to hear this case, and has failed to do so. Because of this failure, Petitioner, who has been deported to the Republic of Ireland, has never received judicial review of his case. Indeed, while Petitioner's wife and children are able to remain in the United States, Petitioner is ineligible for admission because of a faulty decision holding him to be a member of a terrorist organization that has never been designated as such by the Department of State. Such faulty, non-reviewed determination further precludes him from seeking an adjustment of status. In addition, the Board of Immigration Appeals failed to give Petitioner the benefit of a presumption of a well-founded fear of persecution if returned to Northern Ireland. Accordingly, given the procedural due process and

substantive due process violations, this Court should grant certiorari in this case.

Respectfully submitted,

McELHATTON DARREFF
& SHIELDS, P.C.

Daniel P. McElhatton, Esquire
Attorney for Petitioner
1735 Market Street, 43rd Floor
Philadelphia, Pennsylvania 19103
(215) 564-5111
(215) 564-5115

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 03-3081

[Filed August 3, 2004]

JOHN ANTHONY MCNICHOLL,)
Petitioner)
)
v.)
)
ATTORNEY GENERAL USA)
(Agency No. A73 517 422))
)

SUR PETITION FOR PANEL REHEARING

Present: ALITO, FUENTES AND CHERTOFF, Circuit Judges

The Petition for Rehearing filed by the Petitioner in the above-entitled matter, having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing by this panel, the Petition for Reheating is hereby DENIED.

BY THE COURT,

/s/ _____
Julio M. Fuentes
Circuit Judge

DATED: August 3, 2004
CMD/cc: Daniel P. McElhatton, Esq.
James J. Orlow, Esq.
Linda S. Wernery, Esq.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 03-3081

[Dated June 4, 2004]

JOHN ANTHONY MCNICHOLL,
Petitioner

v.

ATTORNEY GENERAL USA
(Agency No. A73 517 422)

Present: ALITO, FUENTES AND CHERTOFF, Circuit Judges

1. Motion by Petitioner to Reinstate the Appeal and to file the Brief and Appendix by March 31, 2004.

2. Motion by Respondent to Dismiss for Lack of Jurisdiction.

3. Response by Petitioner to Motion to Dismiss.

4. Respondent's Reply to Petitioner's Opposition to Respondent's Motion to Dismiss for Lack of Jurisdiction.

Brief and Appendix received 3/30/04.
Sent for Court's information.

_____
Chiquita Dyer
Case Manager 267-299-4919

ORDER

The foregoing motion at (1) is granted. However, the motion at (2) is granted as the Court lacks jurisdiction.

By the Court,

/s/ _____
Julio M. Fuentes
Circuit Judge

Dated: June 4, 2004
CMD/cc: James J. Orlow, Esq.
Linda S. Wernery, Esq.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 03-3081

[Filed March 15, 2004]

John Edward Anthony McNicholl, Petitioner,	)
v.	)
Attorney General United States of America, Respondent.	)

ORDER

Pursuant to Rule 3(a) of the Federal Rules of Appellate Procedure and Third Circuit LAR Misc. 107.2,

It is ORDERED that the above-entitled case is hereby dismissed for failure to timely prosecute by failing to file;

Brief and Appendix

It is FURTHER ORDERED that a certified copy of this order be issued forthwith as the mandate.

For the Court,

/s/ _____
Marcia M. Waldron
Clerk

Date: March 15, 2004

cc: James J. Orlow, Esq.
Christopher C. Fuller, Esq.
Lyle D. Jentzer, Esq.

Received and Filed

/s/ _____
Marcia M. Waldron
Clerk

APPENDIX D

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A73 517 422- Philadelphia

Date: July 10, 2003

In re: JOHN EDWARD ANTHONY MCNICHOLL

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: James J. Orlow, Esquire

ON BEHALF OF DHS: Jeffrey T. Bubier
Assistant District Counsel

CHARGES:

Order: Sec. 241(a)(1)(A), I&N Act [8 U.S.C. § 1251(a)(1)(A)] - Excludable at entry under section 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] - Fraud or willful misrepresentation of material fact

Sec. 241(a)(1)(A), I&N Act [8 U.S.C. § 1251(a)(1)(A)] - Excludable at entry under section 212(a)(3)(B), I&N Act [8 U.S.C. § 1182(a)(3)(B)] - Terrorist activity

Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] - Entered without inspection

Sec. 241(a)(4)(B), I&N Act [8 U.S.C. § 1251(a)(4)(B)] - Terrorist activity

The parties cross appeal from the Immigration Judge's decision finding the respondent deportable as charged, ordering the respondent deported to the Republic of Ireland, finding the respondent ineligible for all relief other than deferral of removal pursuant to the Convention Against Torture, and granting the respondent deferral of removal to the United Kingdom of Great Britain and Northern Ireland. The appeal filed by Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) challenging the grant of deferral of removal to the United Kingdom will be sustained. The respondent's appeal will be dismissed.

I. BACKGROUND

Due to the volume of this case, we will briefly summarize the procedural history. On September 9, 1999, the Immigration Judge denied the respondent's preliminary requests for termination and found that the record supported the charges of deportability. The Immigration Judge then certified the record to the Board (Exh. 18). On June 7, 2000, we declined to review the case in a piecemeal fashion and

returned the record to the Immigration Court (Exh. 19). The respondent then filed a motion to reconsider, which we denied on September 8, 2000 (Exh. 22). Thus, following additional hearings, the Immigration Judge issued a decision, dated May 15, 2001, addressing the respondent's applications for relief. The Immigration Judge found that the respondent, as an alien who committed a terrorist act, is ineligible for all relief other than deferral of removal. The Immigration Judge ordered the respondent deported to the Republic of Ireland and found that the respondent would not likely face torture in the Republic of Ireland. However, the Immigration Judge granted the respondent's application for deferral of removal to the United Kingdom.

The Immigration Judge diligently compiled an organized record of the proceedings. The Immigration Judge's decision, dated September 9, 1999, provides a comprehensive overview of the facts and context of this case. We decline to restate the facts and background information and will rely on the facts as set forth in the Immigration Judge's decision (I.J. at 4-14, 30-37). Furthermore, we will defer to the Immigration Judge's factual findings and credibility assessments (I.J. at 14-30, 40). The immigration Judge's credibility assessments are supported in the record and warrant deference. Furthermore, we find no reversible error in the Immigration Judge's resolution of the arguments raised in the motions and memoranda which the respondent has incorporated into his appeal.[1] Thus, we adopt the Immigration Judge's conclusions about those issues,

---

[1] Because a courier caused the respondent's brief to be filed 1-day late, we have considered the brief filed September 13, 2002. In that brief, the respondent incorporates by reference and resubmits four attachments, one of which relates to the motion to reconsider filed with the Board. The other three attachments are motions and memoranda filed with the Immigration Judge.

including the allegation that the respondent was denied access to exculpatory evidence. In addition, we will adopt and affirm the Immigration Judge's conclusion that the respondent is deportable on the fraud charge (I.J. at 60-61).[2] In light of the importance of the terrorism charges and the respondent's emphasis on the issue in his appeal, we will briefly address the terrorism charges.

II. THE TERRORISM CHARGES

The Immigration Judge's decision regarding deportability is thorough, well written, and well reasoned. The Immigration Judge found that the DHS sustained the burden of proving that the respondent is deportable as an alien who has engaged in terrorist activity. *See* sections 212(a)(3)(B) and 24l(a)(4)(B) of the Act. The relevant portion of the statute provides that "[a]ny alien who...has engaged in a terrorist activity" is excludable. Section 212(a)(3)(B)(i) of the Act (revised by Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56 § 411 (2001)[3] to refer to admissibility rather than excludability). The term "engage in a terrorist activity" means "**in an individual capacity or as a member of an organization**... to commit or incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity."

---

[2] The respondent conceded deportability as an alien who entered without inspection.

[3] The USA Patriot Act of 2001 revised section 212(a)(3)(B) and the changes are retroactive, with an exception not relevant in this case. The USA Patriot Act did not alter the language as applied in the Immigration Judge's decision.

Section 212(a)(3)(B)(iv) of the Act (emphasis added) (formerly found at section 212(a)(3)(B)(iii) and providing that the term "engage in a terrorist activity" means "to commit, in an individual capacity or as a member of an organization, an act of terrorist activity"). "Terrorist activity" means "any activity which is unlawful under the laws of the place where it is committed... and which involves... the use of any... firearm ... (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals." Section 212(a)(3)(B)(iii) of the Act (previously found at 212(a)(3)(B)(ii) of the Act).

On appeal, the respondent asserts that the Department of State has jurisdiction to designate an organization as a terrorist organization and that the Department of Justice usurped that authority in this case. The Immigration Judge and the DHS fully acknowledge that section 219 of the Act gives authority to the Department of State to designate an organization as a terrorist organization (DHS Br. at 32-33). The DHS points out that section 219 of the Act allows the Department of State to freeze the assets of an organization upon designation as a terrorist organization. The Immigration Judge concluded, and the DHS continues to contend, that section 219 of the Act does not divest the Attorney General of the authority to determine whether an alien is deportable under the Act (DHS Br. at 32).

We agree that section 219 of the Act delegates to the Department of State the authority to follow certain procedures and designate an organization as a terrorist organization. The respondent implicitly argues that, because the Department of State holds the authority in section 219 of the Act, the Attorney General lacks the ability to address an alien's excludability, or inadmissibility. However, the institution of immigration proceedings and a determination of whether an

alien is excludable pursuant to section 212(a)(3)(B) of the Act does not involve the designation of an organization as a terrorist organization. For instance, as the Immigration Judge noted, any alien may be excludable if he or she commits a terrorist act in an individual capacity, without the involvement of an organization. Such a case clearly does not turn on the issue of whether the Department of State has designated an organization as a terrorist organization.

Furthermore, the pertinent language covers aliens who engage in a terrorist activity in an individual capacity or **as a member of an "organization."** *See* section 212(a)(3)(B)(iv) of the Act (formerly section 212(a)(3)(B)(iii) of the Act). The pertinent language refers only to the term "organization," without qualifying that the organization be a "terrorist organization." Other provisions in the current version of section 212(a)(3)(B) of the Act qualify the term "organization" with the term "terrorist." *See* sections 212(a)(3)(B)(iv)(IV)(bb), 212(a)(3)(B)(iv)(IV)(cc), 212(a)(3)(B)(iv)(V)(bb), and 212(a)(3)(B)(iv)(V)(cc) of the Act.

Moreover, section 219 of the Act provides that the Department of State may designate an organization as a terrorist organization if the Secretary finds that the organization, among other things, "engages in terrorist activity (as defined in section 212(a)(3)(B))." Thus, section 219 of the Act clearly contemplates that an organization may "engage in terrorist activity" as defined in section 212(a)(3)(B) of the Act before the organization is actually designated as a "terrorist organization" by the Department of State.

In conclusion, we find that the Immigration Judge properly weighed the testimony and documentary evidence

and reasonably concluded that the DHS sustained the burden of proving that the respondent committed an act of terrorist activity, namely an activity that was unlawful where committed and involved the use of a firearm with intent to endanger the safety of one or more individuals. Thus, we next turn to the issue of relief.

III. RELIEF FROM DEPORTATION

We will affirm the Immigration Judge's assessment of the respondent's ineligibility for relief other than deferral of removal pursuant to the Convention Against Torture (2001 I.J. at 2-3). *See* 8 C.F.R. § 208.17 (2003). The Immigration Judge ordered the respondent deported to the Republic of Ireland and found that the respondent did not likely face torture in the Republic of Ireland. The Immigration Judge then suggested that, in "the unlikely event that the government of the Republic of Ireland would not accept" the respondent, the respondent faced the "remote possibility of forcible return to Northern Ireland, which is still constitutionally associated with the United Kingdom" (2001 I.J. at 4). The Immigration Judge then granted the respondent deferral of removal to the United Kingdom.

On appeal, the DHS asserts that the respondent did not sustain the "more likely than not" burden applicable to deferral of removal. *See* 8 C.F.R. § 208.16(c) (2003). In addition, the DHS argues that the respondent failed to show that he more likely than not faces torture at the hands of officials or with the acquiescence of government officials. *See* 8 C.F.R. § 208.18(a) (2003). The DHS also contends that the background evidence does not support the Immigration Judge's decision.

Where the respondent was ordered deported to the Republic of Ireland, the respondent is a citizen of the Republic of Ireland, the respondent testified that he would return to the Republic of Ireland (Tr. at 98), and the Department of State does not indicate any reason to suspect that the respondent would not be able to return to the Republic of Ireland (Exh. 29; *see also* Exh. 28-C), the Immigration Judge addressed a fairly speculative issue about the possibility that the respondent faces torture if deported to the United Kingdom.[4] Although the issue is speculative and could potentially be construed as harmless error, we will reach the merits. The record does not support the conclusion that the respondent *more likely than not* faces "torture" in the United Kingdom.

The Department of State reports that "[a]s of July 30, 2000, all paramilitary prisoners were released from prison under the Good Friday Agreement" (Exh. 29). Those individuals who were previously convicted for terrorist offenses generally "go about their lives freely in Northern Ireland" (Exh. 28-C at 2; Exh. 29). Progress in Northern Ireland is evident in the form of various investigations, the prosecution of Royal Ulster Constabulary (RUC)[5] officers who abused a Catholic detainee, the reform of the police force, efforts to increase the number of Catholic officers, the introduction of new human rights standards, the broader use

---

[4] In the conclusion of the initial and reply briefs, the DHS states that the respondent should be ordered deported to Northern Ireland. The DHS, however, does not raise substantive legal arguments challenging the Immigration Judge's order designating the Republic of Ireland.

[5] The group is now called the Police Service of Northen Ireland (PSNI).

of community policing practices, the implementation of a new complaint process, the closure of three centers previously used to detain and interrogate suspected terrorists, the advent of recorded interrogations, and the substantially diminished number of complaints against police (Exh. 28-A). Furthermore, although the respondent stresses the collusion between members of the RUC and loyalist paramilitaries, two of the respondent's witnesses testified that the collusion was not institutionalized or widespread (Tr. at 74, 237, 245, 260). One of his witnesses noted that the government provides at least some money to fund protective measures in the event an individual is targeted (Tr. at 216-17).

The Immigration Judge acknowledged the reforms in Northern Ireland and noted that, by the end of 2000, the reforms were not yet complete (IJ. at 4). The Immigration Judge found that "[w]hile the law in Northern Ireland forbids torture, *individual members* of the police *occasionally* abused detainees." (I.J. at 4) (emphasis added). The Immigration Judge concluded that, "[c]onsidering the still incomplete reform of the police and the continuing controversy regarding policing in Northern Ireland, the *possibility exists* that the respondent *could become* the victim of police abuse *if he fell into the hands of certain elements* of the police." (I.J. at 5) (emphasis added). The mere possibility of abuse by certain elements, however, is not the material issue. Rather, to demonstrate eligibility for deferral of removal, the respondent must prove that he more likely than not faces "torture" by officials or with the acquiescence of officials.

The occasional abuses by individual officers are not sufficient to come within the specific definition of "torture" or to show that torture will more likely than not occur. In addition, although the Immigration Judge referred to the occasional abuse of detainees, the Immigration Judge did not

address whether the respondent demonstrated that he would more likely than not be detained. We note the testimony of the respondent's witness about the likelihood that someone detained for prior crimes would likely be released immediately (Tr. at 222). We also again refer to the information provided by the Department of State about the release of all paramilitary prisoners under the Good Friday Agreement. The record does not support the finding that the respondent will more likely than not be detained and, if detained, that he more likely than not will be tortured. *See Matter of M-B-A-*, 23 I&N Dec. 474 (BIA 2002). Moreover, the record does not support the conclusion that, even if the respondent faces torture by certain elements, the torture would be with the government's acquiescence. *See Matter of Y-L-, A-G; & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002); *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002). Thus, we will vacate the Immigration Judge's decision to grant the respondent deferral of removal to the United Kingdom.

IV. THE RESPONDENT'S REFERENCE TO EMERGING EVIDENCE

Finally, on appeal the respondent also refers to new issues "in light of recent developments" (Respondent's Br. at 1). Specifically, he alleges that "evidence now said to be becoming available" will impeach the DHS witnesses and that the emerging evidence will reveal that some of the witnesses "misrepresented facts" (Respondent's Br. at 1-2). He also suggests that One or more individuals in the Department of Justice may also be "infected with 'collusion'" (Respondent's Br. at 3). In reply, the DHS opposes any suggestion that the record should be remanded where the respondent did not identify the source or the exact nature of the allegedly emerging evidence or the basis for the assertions. The DHS

also rejected the notion that the DHS was attempting to subvert the peace process.

To the extent the respondent requests remand, the motion is governed by the requirements applicable to motions to reopen, including the requirement that supporting evidence must be filed along with the motion. *See* 8 C.F.R. § 3.2(c) (2003). We decline to remand the record where the assertions are not supported with affidavits or any concrete description of the alleged evidence or any estimation regarding when the alleged evidence might fully emerge. Furthermore, although he attached two submissions to his reply brief, the respondent has not shown that the documents constitute new, previously unavailable evidence. The document titled "Collusion" does not indicate the date on which it was written and the respondent has not specified such a date. Thus the respondent failed to show that the document constitutes new evidence. The second document is a copy of an affidavit, dated February 3, 1999. The document predates both of the Immigration Judge's decisions. Thus, the document is not new. Moreover, the respondent has not identified any reason why the document would have been previously unavailable or unobtainable. Thus, to the extent the respondent seeks remand, we decline to remand the record for further hearings. Furthermore, as the Board is an appellate body, we review the record as it existed before the Immigration Judge and decline to accept additional evidence on appeal. *See Matter of Haim,* 19 I&N Dec. 641, 643 (BIA 1988).

V. CONCLUSION

The Immigration Judge correctly concluded that the respondent is deportable as charged. In addition, the Immigration Judge committed no reversible error in addressing the respondent's preliminary motions and requests

for termination. However, the Immigration Judge erred in finding that the respondent sustained the burden of proving that he would more likely than not face torture in the United Kingdom. Accordingly, we will enter the following orders.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: The appeal filed by DHS is sustained.

FURTHER ORDER: The Immigration Judge's decision to grant the respondent's application for deferral of removal to the United Kingdom of Great Britain and Northern Ireland is vacated.

FURTHER ORDER: The respondent shall be deported to the Republic of Ireland as stated in the Immigration Judge's decision.

/s/ _____
Patricia A. Cole
FOR THE BOARD

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
PHILADELPHIA, PENNSYLVANIA

File No. A73 517 422

IN THE MATTER OF)
)
John Edward Anthony McNicholl)
)
Respondent)

IN DEPORTATION PROCEEDINGS

CHARGES: Former section 241(a)(1)(B) of the Immigration and Nationality Act, alien who has entered the United States without inspection.

Former section 241 (a)(1)(A) of the Immigration and Nationality Act, alien excludable from the United States as one who sought to procure documentation or entry into the United States by willfully misrepresenting a material fact under section 212(a)(6)(c)(i) of the same Act.

Former section 241(a)(1)(A) of the Immigration and Nationality Act, alien

excludable from the United States as an alien who has engaged in a terrorist activity under section 212(a)(3)(B)(i)(I) of the same Act.

Former section 241(a)(4)(B) of the Immigration and Nationality Act, alien deportable from the United States as one who may have engaged in any terrorist activity as defined in section 212(a)(3)(B)(iii) of the same Act.

APPLICATIONS: Termination of charges of deportability relating to terrorism and fraud; adjustment of status; suspension of deportation; asylum; withholding of deportation; protection under the Convention against Torture; and, voluntary departure.

IN BEHALF OF RESPONDENT:

James J. Orlow, Esquire
600 Chestnut Street
Suite 1154
Philadelphia, Pa,

IN BEHALF OF SERVICE:

Daryl F. Bloom
Jeffrey T. Bubier
Assistant District Counsel
U.S. Immigration and
Naturalization Service
Philadelphia, PA. 19130

WRITTEN DECISION AND ORDER OF THE IMMIGRATION JUDGE

On September 9, 1999, the Immigration Court entered an interlocutory order sustaining each of the charges of deportability brought against the Respondent. (Exhibit 17, File number 13.) Specifically, the Court concluded that the Respondent was subject to deportation as an alien who had entered the United States without inspection pursuant to former section 241 (a)(1)(B) of the Immigration and Nationality Act (hereinafter "Act"); as an alien who is excludable for having sought to obtain documentation for admission into the United States by willfully misrepresenting a material fact under former sections 241(a)(1)(A) and 212(a)(6)(c)(i) of the Act; as an alien who is excludable from the United States as one who has engaged in a terrorist activity under former sections 241(a)(1)(A) and 212(a)(3)(B)(i)(l) of the Act; and, as an alien who is deportable from the United States pursuant to former section 241 (a)(4)(B) of the Act for having engaged in terrorist activity as defined in section 212(a)(3)(B)(iii) of the Act.

The Court then certified the matter to the Board of Immigration Appeals (hereinafter "Board"). (Exhibit 18, File number 13.) On June 7, 2000, the Board returned the case to the Immigration Court with instructions that it should hear and decide the Respondent's applications for relief from deportation. (Exhibit 19, File number 13.) Respondent sought reconsideration of this decision by the Board (Exhibit 20, File number 13), a motion the U.S. Immigration and Naturalization Service opposed (Exhibit 21, File number 13); but the Board did not relent. (Exhibit 22, file number 13.)

The Immigration Court's decision regarding the two charges of deportability relating to terrorism precluded the

Respondent from qualifying for adjustment of status, suspension of deportation, and voluntary departure. (Exhibits 23 and 24, File number 13.) He cannot apply for adjustment of status because he is inadmissible to the United States under section 212(a)(3)(B)(i)(I) of the Act for having engaged in terrorist activity. The Act provides no waiver for this ground of inadmissibility. The charge of deportability under former section 241(a)(4)(B) of the Act makes the Respondent ineligible for suspension of deportation under former section 244(a)(1) of the Act, and voluntary departure under former section 244(e)(2) of the Act. *See* sections 413 (b), (c) and (g) of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996).

The Respondent filed an Application for Asylum and Withholding of Removal with the Immigration Court in 2001. (Exhibit 25, File number 13.) Since he filed his asylum application after April 1, 1997, he cannot qualify for such relief because he engaged in a terrorist activity as set forth in Section 212(a)(3)(B)(i) of the Act. *See* section 208(b)(2)(A)(v) of the Act; *see also* 8 C.F.R. 208.13(c). The same conclusion is mandated by section 237(a)(4)(B) of the Act, the successor to former section 241(a)(4)(B) of the Act. Finally, the Respondent is time-barred from applying for asylum. *See* section 208(a)(2)(B) of the Act. The evidence does not support the contention that there are changed circumstances which materially affect the applicant's eligibility for asylum that would excuse his delay in applying for asylum. *See* section 208(a)(2)(D) of the Act.

Because deportation proceedings in this case commenced prior to April 1, 1997, an application for withholding of deportation or under the Convention against Torture (hereinafter "CAT") "shall be denied" if the applicant falls

within former section 243(h)(2) of the Act as it appeared prior to that date. *See* 8 C.F.R. 208.16(d)(2). Before April 1, 1997, section 243(h)(2) of the Act contained a provision that an alien deportable as a terrorist under former section 241(a)(4)(B) of the Act is considered to be a danger to U.S. security. AEDPA, effective April 24, 1996, added the sentence regarding terrorists. *See* Pub. L. No. 104-132, section 413(a), 110 Stat. 1214, 1269. Although the Respondent has been residing in the United States since 1984, with no evidence that he has engaged in terrorism in this country, the statute only requires "reasonable grounds" for believing that a danger to U.S. security exists and not a showing of actual danger. *See* former section 243(h)(2)(D). In an age when the United States is seeking international cooperation in its struggle to defend the American people from terrorism, unwillingness to provide such cooperation in turn could constitute reasonable grounds for regarding the alien as a danger to the security of the United States. For these reasons, the Respondent is barred from withholding of deportation under former section 243(h)(2)(D)and CAT. *See* 8 C.F.R. 208.16(c)(4).

Notwithstanding the alien's amenability to mandatory denial of withholding of deportation under 8 C.F.R. 208.16(d)(2), he can apply for deferral of deportation under 8 C.F.R. 208.17(a), provided that he is otherwise eligible for protection under CAT. The burden of proof is on the applicant for protection under CAT to establish that it is more likely than not that he would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. *See* 8 C.F.R. 208.16(c)(2); *see also Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998). All evidence relevant to the possibility of future torture must be considered, including but not limited to, information regarding past torture, possible relocation within the country

of removal where the alien is not likely to be tortured, country conditions, evidence of gross, flagrant or mass violations of human rights within the country of removal, and other relevant information regarding conditions in the country of removal. *See* 8 C.F.R. 208.16(c)(3).

In this case, although the Respondent was born in northern Ireland, he is a citizen of the Republic of Ireland where he lived from 1976 until he immigrated to the United States in 1984. There is no evidence that the Respondent was ever tortured by the government of the Republic of Ireland during that time, *see* 8 C.F.R. 208.18(a)(1); and, no evidence that he faces a clear probability of torture at the hands of the government of the Republic of Ireland if required to return there in the future. In fact, the government of the Republic of Ireland does not practice torture. *See* U.S. Department of State, Country Reports on Human Rights Practices for 2000 for Ireland. The problem facing the Respondent in the Republic of Ireland, however, is not torture but the possibility that the government of that country might arrest and incarcerate him at Portlaoise prison for his involvement in paramilitary activity. That, of course, is a matter beyond the scope of protection afforded by CAT. *See* 8 C.F.R. 208.18(a)(3).

When one speaks of the pain and suffering caused by the long civil war in Northern Ireland, one must be respectful and understanding of the feelings of those involved, including the several witnesses who testified in behalf of the Respondent in the relief phase of these proceedings. With due respect for their feelings and sufferings, the Court is nonetheless obliged to observe that they all presumed that the Respondent would be returned to Northern Ireland, when in fact, as noted above, he is returnable to the Republic of Ireland. Alleged conditions in Northern Ireland are, therefore, inapposite, especially since

the Respondent is ineligible for asylum and withholding of deportation. Only in the unlikely event that the government of the Republic of Ireland would not accept him would the Respondent face the remote possibility of forcible return to Northern Ireland, which is still constitutionally associated with the United Kingdom. In such case, the only relief he could seek is deferral of deportation as to the United Kingdom under CAT.

Northern Ireland is currently in a period of transition under the terms of the Good Friday Agreement of 1998. That agreement mandated wide-ranging reforms in policing and criminal justice in Northern Ireland with the aim of developing fair, effective, and representative law-enforcement institutions that have the confidence of all parts of the community. In November 2000, the British Parliament passed a Northern Ireland Police Bill based upon the recommendations of the Independent Commission on Policing in Northern Ireland (commonly known as the Patten Commission). The law changes the name of the police force, imposes hiring quotas to increase Catholic representation in the service (now only 8 percent of the total), and introduces new human rights standards and wider use of community policing practices. The law establishes a new policing board comprised of 9 public members and 10 political party representatives from the legislative Assembly of Northern Ireland. By the end of 2000, implementation of police reform was still not completed.

While the law in Northern Ireland forbids torture, individual members of the police occasionally abused detainees. (Group Exhibit 28, item A at 4.) The record in this case shows that the role of the police in Northern Ireland has been controversial. (*See e.g.*, Group Exhibit 6, items 1.2 and 1.3 in File number 5.) It continues to be so. Although a

number of suspects were questioned, no one was charged with the murder of lawyer Rosemary Nelson who died in a car bomb attack in 1999. The Red Hand Defenders, a loyalist splinter group, claimed responsibility. Human rights groups continued to express concern about alleged police collusion in the murder. Nelson, known for taking high-profile civil rights cases, claimed as early as 1997 that the police had made death threats against her. The Independent Commission for Police Complaints investigated the matter and came to the conclusion that there was "insufficient evidence" to discipline the police officers accused of threatening Nelson.

It is likely that the Respondent would be considered as the same kind of high-profile Catholic nationalist as Ms. Nelson. There are several reasons for this. Twenty-five years after the Dungiven incident, the police still maintain interest in the Respondent. Unlike nationalists "who have previously been convicted and have served prison terms for criminal and/or terrorist offenses, who are able to participate openly in the political process" in Northern Ireland, the Respondent escaped before he could be convicted for his part in the 1975 assault upon two police officers in which one died. (Exhibit 29.) What is more, the Irish National Liberation Army, in which the Respondent served when he lived in Northern Ireland, is not maintaining a total and unequivocal cease-fire following the Good Friday Agreement, in the opinion of the government of Northern Ireland. (Group Exhibit 28, item A at 3.) Considering the still incomplete reform of the police and the continuing controversy regarding policing in Northern Ireland, the possibility exists that the Respondent could become the victim of police abuse if he fell into the hands of certain elements of the police.

ORDERS

ORDER: The Respondent's application for asylum is denied.

ORDER: The Respondent's application for withholding of removal is denied.

ORDER: The Respondent's request for protection under the Convention against Torture as to the Republic of Ireland is denied.

ORDER: The Respondent's application for deferral of deportation as to the United Kingdom of Great Britain and Northern Ireland is granted.

ORDER: The Respondent's application for adjustment of status is denied.

ORDER: The Respondent' s application for suspension of deportation is denied.

ORDER: The Respondent's application for voluntary departure is denied.

ORDER: The Respondent shall be deported to the Republic of Ireland.

May 15, 2001 /s/ _____

Craig DeBernardis
Immigration Judge

APPENDIX F

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A73 517 422- Philadelphia

Date: September 8, 2000

In re: JOHN EDWARD ANTHONY MCNICHOLL

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: James J. Orlow, Esquire

ON BEHALF OF SERVICE: Daryl F. Bloom
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(A), I&N Act [8 U.S.C. § 1251(a)(1)(A)]- Excludable at entry under section 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] - Fraud or willful misrepresentation of material fact

Sec. 241(a)(1)(B),I&N Act [8 U.S.C. § 1251(a)(1)(B)] Entered without inspection

APPLICATION: Reconsideration

In a decision dated September 9, 1999, the Immigration Judge concluded that the evidence of record supported the charges of deportability, and he entered interlocutory orders denying the respondent's motions to terminate. Because the case addressed an issue on which there is not a wide body of case law available, i.e., terrorist activity, the Immigration Judge certified the case to the Board of Immigration Appeals pursuant to 8 C.F.R. § 3.1(c), requesting that we review these interlocutory orders. By decision dated June 7, 2000, the Board declined to take this case on certification, and we retraced it to the Immigration Court for further proceedings. On July 7, 2000, the respondent filed a motion for reconsideration. When deciding a motion to reconsider, the Board considers the case as though the decision in the case on the record before us had never been entered. If the applicant was eligible for relief at the time of the original decision, then in reconsidering the decision, we treat his status as that which it had been at the time of the initial decision. "The very nature of a motion to reconsider is that the original decision was defective in some regard." *Matter of Cerna,* 20 I&N Dec. 399, 402 (BIA 1991). The motion to reconsider will be denied.

The respondent argues that although his counsel was "duly noted" in our June 7, 2000, decision, that decision was incorrectly served on the respondent directly in violation of 5 U.S.C. § 500(f), as well as 8 C.F.R. §§ 3.1(f) and 292.5(a) (indicating that service of papers shall be on the alien's attorney or representative of record, or on the alien himself,

if unrepresented). To the extent that the Board erred in not serving a copy of its decision directly on the respondent's counsel, we note that the respondent's counsel was aware of the decision, and he was obviously able to file a timely motion for reconsideration. Therefore, even if there was procedural error in the service of the Board's June 7, 2000, decision, the respondent has not established that he was prejudiced by the error, or that this error provides a basis for granting his motion for reconsideration. *See Matter of Santos,* 19 I&N 105, 107 (BIA 1984) (noting that an alien must demonstrate that he has been prejudiced by a violation of a procedural rule or regulation before his deportation proceeding will be invalidated).

The respondent also argues that there was a "procedural error" in that neither the Board or the Immigration Judge provided the respondent an opportunity to be heard before we issued our June 7, 2000, decision. The respondent argues that this procedural error resulted in him being denied due process and that the Board must, therefore, grant his motion to cure this denial of due process. We disagree. In our June 7, 2000, decision, we noted that the Notice of Certification failed to "inform the parties...that they have the right to make representations before the Board, including the making of a request for oral argument and submission of a brief." *See* 8 C.F.R. § 3.7. However, because we declined to consider the case on certification, the respondent was not harmed based on the deficient Notice of Certification, as he did not lose the opportunity to brief the issues in this case prior to the Board issuing a decision on the merits. Therefore, we find this allegation of procedural error insufficient to warrant reconsideration of our prior decision. *See Matter of Santos, supra.*

We reject the respondent's argument that the Board erroneously classified the certification as "interlocutory" and failed to consider the nature of the bifurcated proceedings below. Our June 7, 2000, decision explicitly recognized that the proceedings below were bifurcated and that only the issue of deportability was before the Immigration Judge. However, issues of deportability are often intertwined with issues regarding relief from deportation. For this reason, we decided that it was appropriate to allow the Immigration Judge to rule on all pending issues of deportability and possible relief before the Board considers this case. This approach will promote judicial economy[1] by allowing the Board to address all of the issues in this case at once, with the benefit of a complete decision by the Immigration Judge and briefs submitted by both parties.

Finally, we reject the respondent's argument that our June 7, 2000, decision adds an additional requirement to the applicable regulations, i.e., that the entire case be completed by a decision which is "final" in all respects prior to the Board's considering the case on certification. No such requirement exists. However, in this particular case we decided, in the exercise of our discretion, that it would be appropriate to wait until the Immigration Judge had decided all issues of deportability and relief prior to the Board's consideration of the case. Because the Board acted within its discretion when it declined to review this case on certification, the respondent is not entitled to reconsideration because he cannot establish error in our June 7, 2000, decision. *See* 8 C.F.R. § 3.7 ("The Board in its discretion

---

[1] We understand that considerable resources will be needed to adjudicate this case. However, this is not a valid reason for the Board to intervene at this time, and in the end judicial economy will not be served by litigating the case in a piecemeal fashion.

may elect to accept for review or not accept for review any such certified case.").[2] Therefore, the following order shall be entered.

ORDER: The respondent's motion for reconsideration is denied.

/s/ _____
Edward R. Grant
FOR THE BOARD

---

[2] When deciding this motion, we have not considered the misplaced arguments raised by either party regarding the merits of this case.

APPENDIX G

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A73 517 422- Philadelphia

Date: June 7, 2000

In re: JOHN EDWARD ANTHONY MCNICHOLL

IN DEPORTATION PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: James J. Orlows Esquire

ON BEHALF OF SERVICE: Daryl F. Bloom
Assistant District Counsel

CHARGE: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(l)(B)] - Entered without inspection

Sec. 241(a)(1)(A), I&N Act [8 U.S.C. § 1251(a)(1)(A)]- Excludable at entry under section 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i), Fraud or

willful misrepresentation of material fact

ORDER:

PER CURIAM. In a decision dated September 9, 1999, the Immigration Judge concluded that the evidence of record supported the charges of deportability by clear, unequivocal, and convincing evidence (I.J. at 61). The Immigration Judge entered interlocutory orders denying the respondent's various motions to terminate.[1] However, because the case addressed an issue on which there is not a wide body of case law available, i.e., terrorist activity, the Immigration Judge certified the case to the Board of Immigration Appeals pursuant to 8 C.F.R. § 3.1 (c), requesting that we review these interlocutory orders. We decline to take this case on certification and return it to the Immigration Court for further proceedings.

The Immigration Judge has certified this case to the Board requesting that we review his decision regarding issues of deportability which are somewhat novel. The Immigration Judge noted that in the event we found his decision to be correct, such a finding would result in the respondent being ineligible for various forms of relief. The Immigration Judge suggests that judicial economy will be served by confirming at this point whether his decision regarding deportability is correct because such a determination forecloses the need for further extensive hearings on relief from deportation.

---

[1] The proceedings below were bifurcated so that only the issue of deportability was before the Immigration Judge. The parties agreed to address the issue of any possible form of relief from deportation after the issue of deportability was finally settled.

The Immigration Judge's certification of these issues to the Board serves, for all practical purposes, as an interlocutory appeal. In order to avoid piecemeal review of the myriad questions which may arise in the course of exclusion and deportation proceedings, this Board does not ordinarily entertain interlocutory appeals. *See Matter of Ruiz-Campuzano,* 17 I&N Dec. 108 (BIA 1979); *Matter of Ku,* 15 I&N Dec. 712 (BIA 1976); *Matter of Sacco,* 15 I&N Dec. 109 (BIA 1974). We have, however, on occasion ruled on the merits of interlocutory appeals where we deemed it necessary to address important jurisdictional questions regarding the administration of the immigration laws, or to correct recurring problems in the handling of cases by Immigration Judges. *See, e.g., Matter of Guevara,* 20 I&N Dec. 238 (BIA 1990, 1991), *and cases cited therein; Matter of Dobere,* 20 I&N Dec. 191 (BIA 1990). We see no reason to treat an interlocutory request for certification differently.

We decline to consider this interlocutory certification. We find no indication that this case presents a recurring problem in the administration of the immigration laws or a question regarding jurisdiction. The Immigration Judge's decision is well-written and comprehensively discusses each of the issues regarding deportability raised below. We find it appropriate for the Immigration Judge to render a comprehensive decision which addresses both deportability and any possible relief. This would promote judicial economy and allow all of the

issues to be addressed in the form of a single direct appeal. For these reasons, the record is returned to the Immigration Court without further action.[2]

/s/ _____
Edward R. Grant
FOR THE BOARD

---

[2] We note that the Notice of Certification failed to "inform the parties…that they have the right to make representations before the Board, including the making of a request for oral argument and the submission of a brief." 8 C.F.R. § 3.7.

APPENDIX H

U.S. Department of Justice

Executive Office for Immigration Review

Immigration Court
1600 Callowhill Street
Suite 400
Philadelphia, Pennsylvania 19130

September 09, 1999

Honorable Paul W. Schmidt
Chairman, Board of Immigration Appeals
5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

RE: John Edward Anthony McNicholl
A73-517-422

Dear Mr. Chairman:

Pursuant to 8 C.F.R.3.1(c), I am hereby certifying this case to the Board of Immigration Appeals for review of the Immigration Court's decision regarding the three contested issues of deportability. My reasons for the certification are set forth in my decision at page 61. I have attached the record of proceeding, including a transcript and briefs of the parties. The parties have already received a copy of the transcript.

By copy of this letter, I have notified the parties of my decision to certify. *See* 8 C.F.R.3.7.

Thank you for your attention in this matter.

Respectfully,

/s/ _____
Craig DeBernardis
Immigration Judge

cc: James J. Orlow, Counsel for Respondent
cc: Darryl F. Bloom, Assistant District Counsel
Jeffrey T. Bubier, Assistant District Counsel

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
PHILADELPHIA, PENNSYLVANIA

IN THE MATTER OF:

John Edward Anthony McNicholl
Respondent

IN DEPORTATION PROCEEDINGS
File No A:73-517-422

CHARGES: Former section 241 (a)(1)(B) of the Immigration and Nationality Act, alien who has entered the United States without inspection.

Former section 241(a)(1)(A) of the Immigration and Nationality Act, alien excludable from the United States as an alien who sought to procure documentation or entry into the United States by willfully misrepresenting a material fact under section 212(a)(6)(c)(i) of the same Act.

Former section 241(a)(1)(A) of the Immigration and Nationality Act, alien excludable from the United States as an alien who has engaged in a terrorist activity under section 212(a)(3)(B)(i)(I) of the same Act.

Former section 241(a)(4)(B) of the Immigration and Nationality Act, alien deportable from the United States as one who

may have engaged in any terrorist activity as defined in section 212(a)(3)(B)(iii) of the same Act.

APPLICATIONS: Termination of the charges of deportability relating to terrorism and fraud; adjustment of status; suspension of deportation; asylum; withholding of deportation; protection under the Convention Against Torture; and, voluntary departure.

ON BEHALF OF THE INS

Daryl F. Bloom
Jeffrey T. Bubier
Assistant District Counsel
U.S. Immigration and Naturalization Service
Philadelphia, PA

ON BEHALF OF THE RESPONDENT

James J. Orlow, Esquire
600 Chestnut Street, Suite 1154
Philadelphia, PA 19106

INTERLOCUTORY ORDER OF THE IMMIGRATION JUDGE REGARDING THE CHARGES OF DEPORTABILITY

The U.S. Immigration and Naturalization Service (hereinafter "Service") brought these deportation proceedings against the above-named Respondent in September 1995, pursuant to the authority provided in former section 242 of the

Immigration and Nationality Act (hereinafter "Act").[1] *See* 8 C.F.R. 3.14(a).

The Respondent is a 47-year-old, married, male alien, a native of County Derry, Northern Ireland. He regards himself as a citizen of the Republic of Ireland; he does not assent to the Service's allegation that he is also a subject of the United Kingdom of Great Britain and Northern Ireland. (Exhibit 7G; Group Exhibit 12, item 11).

Initially, the Service charged the Respondent as an alien who had entered the United States without inspection. (Exhibit 1A). Subsequently, it lodged charges of fraud and terrorism in two superceding charging documents (Exhibits 1B and 1C), the last of which (Exhibit 1C) constitutes the basis of these proceedings and sets forth all of the aforesaid charges of deportability.

The Respondent acknowledged that he is subject to deportation as an alien who had entered the United States without inspection pursuant to former section 241 (a)(1)(B) of the Act. He denied, however, that he is excludable as an alien who had attempted to obtain documentation by means of fraud within the ambit of former sections 24l(a)(1)(A) and 212(a)(6)(C)(i) of the Act. Specifically, he denied allegations of fact numbered 10 to 13, inclusive, as alleged in the Order to Show Cause and Notice of Hearing. (Exhibit 1C). He also disputed allegations of fact numbered 5 to 7, inclusive, in the

---

[1] Because the Service instituted these proceedings before April 1, 1997, citations to the Act are as they existed before April 1, 1997. *See* section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; *see also Matter of Papazyan*, 20 I & N Dec. 568 (BIA 1992).

same charging document, as well as the two charges of deportability relating to the allegations of terrorism. *See* former sections 241(a)(l)(A) and212 (a)(3)(B)(i)(I) of the Act; and, former sections 241(a)(4)(B) and 212(a)(3)(B)(iii) of the act. He sought termination of the charges of deportability regarding alleged fraud and terrorism.

In relief of deportation, the Respondent has expressed interest in a variety of applications. Anticipating termination of the terrorism charges, for which there is no waiver available in the Act, the Respondent's principal application for relief from deportation is adjustment of status to that of a lawful permanent resident of the United States. (Group Exhibit 7A). He is the beneficiary of an approved visa petition filed in his behalf by his wife, who is a naturalized citizen of the United States. (Redesignated Group Exhibit 9, items 6 and 7). Since his wife filed her petition before January 14, 1998, the Respondent would be eligible to adjust his status in the United States under section 245(i) of the Act, despite his manner of entry. *See* section 245(i)(1)(B)(i) of the Act. While the Respondent seeks termination of the fraud charge, he will apply for a waiver of excludability under section 212(i) of the Act in the event that this charge is sustained. If he is unable to qualify for adjustment of status, the Respondent has reserved his right to apply for suspension of deportation, asylum and withholding of deportation, which automatically invokes a request for protection under the Convention Against Torture. *See* 8 C.F.R.208.13(a)(1). Finally, he seeks voluntary departure.

Because of the complexity of the factual and legal issues in this case, the Immigration Court bifurcated the proceedings. Hitherto, it has conducted a full evidentiary hearing regarding only the issues of deportability. The parties submitted their legal arguments regarding those issues. The

present Interlocutory Order of the Court adjudicates only the issues of deportability. Issues regarding relief from deportation will require future evidentiary hearings, legal argument and decision.[2]

FACTS

During the morning of June 27, 1975, Constable William R. Elliott of the Royal Ulster Constabulary (hereinafter "RUC") was the only officer on duty at the RUC station in Dungiven, Northern Ireland. He was preparing to check a report of suspicious activity at the Northern Bank, a short distance from the RUC station. While there he intended to obtain the mail from the post office that adjoined the bank. Standard procedure required that he call for a British army soldier to accompany him. (Transcript (hereinafter "TR") at 281). Private Stephen J. Rhodes of the Sherwood and Worcestershire Foresters received this assignment. (TR at 256). Both were attired in their service uniforms. (TR 257, 282). They each carried a weapon. Private Rhodes had a Browning, nine millimeter, sidearm bearing the serial number 8839 (TR 257, 264); Constable Elliot carried a Walther, nine millimeter, pistol with the serial number 50145. (TR 282). (A

---

[2] The Respondent's legal arguments in support of his motion to terminate the fraud and terrorism charges are set forth in Exhibit 13 for identification. The Service's response in opposition is Exhibit 14 for identification. When the Respondent failed to timely submit Exhibit 13 for identification, the Service moved to obviate it. (Exhibit 15A for identification). The Respondent sought additional time (Exhibit 15B for identification), which the Service opposed. (Exhibit 15C for identification). The Respondent did not oppose entry of a decision after his brief was submitted. (Exhibit 15D for identification). The Court received the Respondent's brief out of time (Exhibit 15E).

map showing the location of the RUC station, the bank and the post office appears in the record). (Group Exhibit 4, item 52, at 75 - 76).

When they arrived at the bank, Constable Elliot left their vehicle to talk with the bank manager and fetch the mail while Private Rhodes remained in the car. (TR 258, 285). Not long after Constable Elliot returned to the car, he heard a shout. (TR 285). "[T]he next thing I saw an SMG pointed in the window at Constable Elliot, and I turned around and I got a PPK pointed at me". (TR 258, 285). (The acronyms referred to a Sterling sub-machine gun and a Walther pistol respectively). The assailants "pulled us both out of the car. I [and Constable Elliot] was made to lie on my, on my back...." (TR 265, 287). They seized the weapons carded by each officer and took items of their clothing as well as Private Rhodes' army identification. (TR 265, 287-88). Unexpectedly, the siren in their vehicle sounded. (TR 267). After firing several shots (TR 267, 288), the attackers entered "their blue car" and sped away. (TR 268, 289). The RUC made a record of the theft of Constable Elliot's weapon numbered 50145 when he applied for a replacement on July 9, 1975. (Group Exhibit 4, item 136 at 244 - 46; TR 290-91).[3]

One month later, on July 26, 1975, Constable Elliot and his colleague Constable Robert J. McPhearson undertook a mobile patrol in an RUC vehicle at approximately 11:00 A.M. (TR 292, 294). They left the RUC station in Dungiven and

---

[3] The statement of Private Rhodes regarding this incident appears in the record as Group Exhibit 4, item 23 at 32. Two statements of Constable Elliot, one dated May 8, 1979, and the other May 5, 1979, appear in the record at Group Exhibit 8, items 1 and 2.

traveled to Constable McPhearson's residence, approximately three miles outside of Dungiven, so that Constable McPhearson could check on his wife who was pregnant and not feeling well. While at Constable McPhearson' s home, they received a radio communication from a police dispatcher in Limavady where the RUC maintained a headquarters. (TR 291 - 95).[4] The message stated that there was a suspicious person loitering outside a pub on Main Street in Dungiven. (TR 296). Both Constables immediately traveled back to Dungiven to investigate.[5]

The Constables saw the suspicious man walking on Main Street near the post office. He "had a growth of beard" and was "wearing a long coat", which the officers regarded as suspicious because it was a hot summer day. (TR 299). They consulted between themselves to determine if either could identify the man. They could not. (*Id.*). They passed the suspicious man but then returned to the scene to investigate further. (TR 300). It was approximately 11:30 A.M. When they returned, they saw the suspicious man exiting the post office. (TR 301). The constables parked their vehicle on Main Street near the post office.[6] Constable Elliot remained with the

---

[4] The statement of the dispatcher is contained in the record at Group Exhibit 4, item 4 at 4.

[5] The record contains a map that shows the route taken by the Constables from McPhearson's home to Dungiven. (Group Exhibit 4, item 52 at 74-77). This map also notes the area where the Constables encountered the suspicious man in Dungiven.

[6] Photographs of the scene outside the post office appear in the record at Group Exhibit 4, item 134, at 213-22. The Constable's car is the one with the open right-rear door at 213-14.(TR 335-42).

vehicle while Constable McPhearson approached the suspicious man. (TR 308). Constable Elliot observed his colleague leading the suspicious man back to their car. "I assumed that he was arresting him, so I opened the... rear passenger's door of the police car". (TR 308).

Suddenly Constable Elliot heard shots. Two individuals from the other side of the street ran in zig-zag fashion toward the police car, firing in Constable Elliot's direction. (TR 308). "I returned fire at the two men coming across the street I shot one of them. Uh, as he stumbled his wig fell off". (TR 313,343). Constable Elliot testified that he had seen the man he shot from a distance of approximately 15 feet. (TR 314). The wounded assailant left the scene. Constable Elliot saw that his colleague was lying prostrate on the sidewalk near the post office. (TR 311). He continued to return fire in the direction of the one man still assaulting him from the street. . . . (TR 315). A fourth man was also shooting at Constable Elliot from a position near the bank. (TR 313, 315). After emptying his magazine containing eight shots, Constable Elliot made his way into the post office where he realized that he had been gravely wounded. (TR 315). In fact, he suffered "seven or eight" bullet wounds in the cheek, neck, back, arms, legs and ankle. (TR 316). His neck and head wounds resulted in the loss of 14 teeth and portions of his gums. (TR 317). He also lost approximately seven feet of his intestines. (TR 334). Constable McPhearson died of his injuries. (*Id.*)

On February 16, 1976, soldiers of the British army stationed in Northern Ireland arrested the Respondent and three other men at a farmhouse in Glen Mullen, Northern Ireland. (TR 432-59, 492, 523, 506 - 20). They found the suspects in possession of a nine millimeter, Browning pistol of the kind issued to members of the British army (TR. 440);

two Walther PPK pistols (TR 441, 513); nine millimeter bullets (TR 441); shot gun shells, knives, gloves and hats (*Id.*); and, two rucksacks, one of which an arrestee said contained a bomb. (TR 442). Further search of the area uncovered a shotgun and rifle. (TR 445). Three of the suspects gave the names Kelly, Turner and McDade. (TR 443). Based upon a photograph he had received from his superiors when he went to Glen Mullen, however, one of the soldiers identified a suspect as the Respondent, whom he believed to be a member of an insurgent organization called the Irish National Liberation Army (hereinafter "INLA"). (TR 443, 450 - 51). The respondent admitted that he had identified himself to the soldiers as Turner. (TR 167). The soldiers placed the seized weapons, etc., into a box[7] (TR 441, 513). They transported the prisoners and the confiscated material to the RUC station in Coleraine, Northern Ireland. (TR 446, 517; Group Exhibit 4, item 94 at 152).

Although it did not arrest the Respondent and the others at the farmhouse (TR 510, 224), the RUC assumed custody of the detainees from the soldiers on February 16, 1976, at approximately 9:00pm. (Group Exhibit 4, item 94 at 152; TR 161, 62.) It made a record of the weapons, etc., confiscated by the soldiers and forwarded this material for forensic examination on February 17, 1976. (*Id.*).

---

[7] The basis for these allegations was the testimony of Corporal James T.G. Gillies and Sergeant William H. Warren. Corporal Gillies statement appears in the record as Group Exhibit 4, item 25 at 35-37. Sergeant Warren's statement is in Group Exhibit 4, item 26 at 38-39. Pictures of the farmhouse where the arrest occurred are found at Group Exhibit 4, item 135 at 230-37. (TR 456-59). Group Exhibit 4 at 238-41 contains photographs of the weapons, etc., seized by the soldiers from the suspects. (TR 406-63).

Three of the guns seized by the soldiers from the Respondent and his cohorts were used in the attack on the constables. Two of them were in fact the same weapons confiscated from Constable Elliot and Private Rhodes on June 27, 1975. The third pistol was Constable McPhearson's, wrested from him in the assault that led to his demise. (Group Exhibit 4, item 41 at 55). The proof for these findings was the testimony of a firearms examiner employed by the Northern Ireland Forensic Agency. (TR 97). He testified that his office had indeed received material delivered by the RUC for forensic examination in two installments on February 17 and 20, 1976. (TR 111, Group Exhibit 4, item 94 at 152 - 55). Included in the material were two Walther pistols, one bearing serial number 50145 and the other number 46515, and a Browning pistol numbered 6T8839. (Group Exhibit 4, item 94 at 153; Group Exhibit 4, item 93 at 148). Previously, on July 27, 31, and August 7, 1975, the RUC had delivered to the forensic laboratory material recovered from the scene of the attack on the constables, including bullets removed from the victims. (TR 115- 16; Group Exhibit 4, item 54 at 79-81). According to the firearms examiner, weapons make distinctive markings on bullets called striae that can connect a bullet to a specific gun. (TR 113 14). The firearms examiner test fired the weapons. (TR 112). He concluded that bullets recovered from the bodies of Constables Elliot and McPhearson had been fired from the Browning pistol (serial number 6T8839) stolen from Private Rhodes on June 27, 1975. One of the bullets that mortally wounded Constable McPhearson came from his own Walther pistol numbered 46515. (TR 116 - 17, 120 - 21; Group Exhibit 4, item 54 at 79 - 81). Further, he determined that bullets found at the scene of the attack on the constables (near their vehicle) had been fired from the Walther pistol numbered 50145 that had been taken from Constable Elliot on June 27, 1975. (TR 119, 121; Group Exhibit 4, item 54 at 79 - 81).

The rucksacks in the possession of the Respondent and his confederates did indeed contain a device designed to ignite an explosive. (Group Exhibit 4, item 92 at 145-47). Specifically, the device was an "improvised or homemade... pressure mat" used to detonate an explosive charge. (TR 139, 146). A scientific officer for the Forensic Science Agency of Northern Ireland, who specializes in explosive devices, explained the construction of a pressure mat and how it can detonate an explosive.[8] (TR 132, 33; 138-53). Basically, when the pressure mat is armed and covertly placed in a vehicle, an unsuspecting victim can inadvertently apply the pressure that completes the electrical circuit necessary to detonate an explosive. (TR 148; Group Exhibit 4, item 92 at 147). It was a "booby-trap" that was "intended to be used against personnel,..., vehicles carrying personnel" and "to blow people up...." (TR 148).

On February 17, 1976, a physician engaged by the RUC examined the Respondent and found that he had "a scar about 1" in diameter just above the left iliac crest and a corresponding but smaller scar posteriorly. These have the appearance of an entry and exit bullet wound and later McNicholl agreed that this was correct". (Group Exhibit 4, item 39 at 53). Indeed, a medical examination of the Respondent on February 5, 1999, conducted by the Deputy Medical Examiner for the City of Philadelphia, Pennsylvania corroborated this finding. (Group Exhibit 4, item 160 at 309; Group Exhibit 8, item 9; TR 182).

Constable Elliot identified the Respondent as one of the assailants in the attack upon him and Constable McPhearson

---

[8] Photographs of the rucksacks and the pressure mats they contained appear in Group Exhibit 4, item 135 at 239, 242-43.

in a so-called informal identification parade conducted by the RUC at its office in Coleraine, Northern Ireland in the afternoon of February 18, 1976. (Group Exhibit 4, item 32 at 46). The identification parade, what we in the United States would call a line-up, was informal because the suspect did not agree to a formal identification procedure. (TR 536-37). According to the RUC officer who organized the identification procedure, he assembled nineteen individuals who were allegedly "similar in size and appearance to the defendant [i.e., the Respondent]". (TR 54142). The officer then brought the Respondent into the room and allowed him to sit where he chose. (TR 541). Allegedly the Respondent "had no marks on him," wore no handcuffs and was attired in "ordinary civilian clothing". (TR 543-44). Once he established the array, the RUC officer "radioed into the police station to bring the witness [i.e., Constable Elliot]" to see if he could make an identification. (TR 543). The officer did not leave the room to bring the witness to avoid any contention "that I could have told the witness, the defendant was sitting in such and such a place"[9] (TR 543). Constable Elliot, who had been kept in a place where he could not have seen any of the participants in the array, entered the room. (TR 545-46, 322, 327). The RUC officer asked him"if there's anyone he recognized there, to point him out to me". (TR 546, 323). Constable Elliot had "a look around" at the people in the room. (TR 323). "There was approximately 18 people in that room with beards". (TR 323). After a short period of time, Constable Elliot told the RUC officer conducting the identification procedure that he identified "the person that I seen in Dungiven Main Street that day which the wig fell

---

[9] The RUC officer prepared a diagram that allegedly shows the array including the position assumed by the Respondent. (Group Exhibit 8, item 5).

off". (TR 323). The RUC officer asked Constable Elliot to "go down and touch the man that you're identifying". (TR 547). Constable Elliot touched the Respondent.[10] (TR 547, 327; Group Exhibit 8 at 7).

Under questioning by an RUC officer, the Respondent denied any involvement in the attack on the constables but accepted "full responsibility for all of the small arms, shotgun and rifle, ammunition and other articles found by the Brits on the premises when I was arrested on 16th February, 1976". (Group Exhibit 4, items 49 and 50 at 71 - 72; TR 568 - 78-79; Group Exhibit 8, item 8; Group Exhibit 4, item 29 at 42).

The RUC held the Respondent at its facility in Coleraine for approximately one week. (TR 229). During this time, on February23, 1976, the RUC brought him before the Belfast Magistrates' Court and charged him with the murder of Constable McPhearson and the attempted murder of Constable Elliot. (Group Exhibit 4 at 139-44; TR 237-38). The Magistrates' Court remanded him to Belfast prison where he remained for approximately one week. (TR 238, 630). The Belfast prison was "the committal prison for all of Northern Ireland," that is to say, the "initial intake" facility for prisoners. (TR 634). It was while in Belfast prison that the Respondent "claimed political status". (TR 183,630). The

---

[10] Exhibit 8, item 6, is the handwritten version of the statement of the RUC officer who conducted the identification procedure later typed and appearing in the record as Group Exhibit 4, item 32 at 46 (TR 549-50). The same officer also handwrote the statement signed by Constable Elliot regarding the identification procedure. (Group Exhibit 8, item 7). This was later typed and signed by Constable Elliot. (Group Exhibit 4, item 5 at 6-7). (TR 552-53).

authorities delivered him to Maze prison on February 26, 1976. (TR 630).

In 1976 Northern Ireland operated two prisons: Belfast for ordinary criminals; and Her Majesty's Prison Maze, called Long Keach by nationalists (TR 239), for those who claimed membership in one of the para - military groups - - Catholic nationalist or Protestant loyalist - engaged in the then violent political struggle that racked the country. (TR 635). Unlike Belfast prison, which was a "standard victorian type prison" (TR 649), Maze was "a prisoner of war camp".(TR 239, 647, 784 - 86). The various para-military groups imprisoned there were segregated. (TR 189, 239-41, 644, 788). Each maintained a military organization consisting of an officer in command (TR 635, 655), two subordinate commanders (TR 638), an intelligence officer, a quartermaster and an escape committee. (TR 639, 646). Inmates at Maze prison enjoyed privileges denied those in Belfast. They were not required to work or wear prison uniforms. (TR 644- 45). Prison officers were not allowed in the areas where the prisoners lived. (TR 645). Prisoners were not confined to cells, making it possible for them to associate with fellow members of their group. (TR 186 - 88, 650, 659, 661).

One of the privileges accorded to the commanding officer of inmates at Maze was the right to accept or reject prisoners into his compound. (TR 635, 654). Although a prisoner himself, the commanding officer interviewed a prisoner claiming affiliation with his para-military organization. (TR 635 - 36). Out of concern for their own security, commanding officers would refuse to accept prisoners in their midst unless satisfied that they were in fact members of their para-military group. (TR 648-49, 651-52, 788-90). The officer commanding prisoners from INLA accepted the Respondent into his compound (number five) after interviewing him when

he arrived at Maze prison. (TR 183-85, 189-90, 196, 634-36, 791-92).

On May 5, 1976, before he could undergo trial on the criminal charges brought against him, the Respondent and eight other members of INLA held in compound number five escaped from Maze prison. (TR 636-37, 190; Group Exhibit 4 at 156-83). Because of the military structure of the INLA compound at Maze prison, the officer commanding the INLA compound chose the inmates who could do so on the basis of paramilitary considerations. (TR 792-94, 808-09).

The Respondent fled to the Republic of Ireland where he worked as a fisherman. (TR 24243). On August 27, 1983, he married Frances T. Brolly, then an Irish national, in the Republic of Ireland. (Redesignated Exhibit 7H; TR 243). In 1984 the Respondent entered the United States with his wife for the first time without inspection. They lived in Boston, Massachusetts until 1987. They had two children born in Massachusetts. (Redesignated Exhibits 7J and K). In June 1987 they moved to Upper Darby, Pennsylvania, a suburb of Philadelphia, where they had their third child. (Redesignated Exhibit 71).

In 1989 the Respondent's wife became eligible for an immigrant visa. She returned to the Republic of Ireland with the Respondent to apply for her immigrant visa at the U.S. Consulate. On January 4, 1990, the Respondent applied to the Consul for an immigrant visa based upon his relationship to his wife. (Group Exhibit 5, item 1). "On his immigrant visa application,..., and in his sworn interview with the consular officer, Mr. McNicholl claimed that he had never been arrested or confined in prison. He repeated this assertion in a second interview on January 17, 1991." (Group Exhibit 5, item 1, Group Exhibit 5, item 2 at question numbered 33).

The U.S. Consul denied the Respondent's application for an immigrant visa. Undeterred, the Respondent returned to the United States surreptitiously.

CREDIBILITY

The Respondent challenged the veracity of each of the four facts that connected him to the assault on the constables. Despite his best effort to impeach those facts, however, they remained reasonably worthy of belief.

1. The Respondent possessed the weapons used in the assault on the constables

The Respondent did not establish any basis for doubt regarding the expertise, methods or findings of the firearms examiner. (TR 99 - 105). There was no evidence of a break in the chain of custody of the guns and bullets he examined. (TR 126 - 28). Hence, it was reasonable to credit the allegation that the guns found in the Respondent's possession were used in the ambush of the constables.

Similarly, the Respondent failed to raise any reasonable doubt regarding the testimony of the two British soldiers who apprehended him and found him in possession of those guns. He had a full opportunity to cross - examine each of them. There was no evidence that their unwillingness to answer questions regarding other operations they may have undertaken during their military careers prevented the Respondent from uncovering relevant evidence in his defense. (TR 470 - 94, 520 - 32). The Service offered these witnesses solely in order to establish the arrest and the discovery of the weapons. Whether his arrest was a "standard military operation" (TR 527) and what the "course of behavior" (TR 528) of individuals in the conflict in Northern Ireland may

have been did not relate to the offer of proof, making it dear that the Respondent suffered no prejudice when the Court denied him the opportunity to ask such questions.

The Respondent denounced his confession of possession of the weapons to the RUC as a product of duress. (TR 173, 251). Allegedly he made that statement only in order to exonerate the elderly owner of the farmhouse where the arrest had occurred. (TR 173 - 74). But he did not explain why he felt such an obligation to help the old man if "there was no guns whatsoever in that house". (TR 170). After all, the Respondent testified that "I never seen any firearms in the house". (TR 176). Subsequently, however, he inconsistently acknowledged that guns had in fact been found in the house but claimed "I have no idea who owned them...." (TR 174). It hardly encouraged confidence in the reliability of the Respondent's testimony to learn that he had allegedly given a false statement to the RUC "so Mr. Mullen could go home". (TR 174). Weighing the Respondent's self-serving testimony on this point against that of the two retired soldiers, who seemingly had nothing to gain from their testimony, it was more reasonable to believe their assertion that they had found him in possession of the guns used in the attack on the constables.

Contrary to his argument, two credible witnesses "connected the guns to Respondent". (Exhibit 13 at 15). The soldiers described in their testimony the weapons they had found in the Respondent's possession, (TR 440-41), and their delivery of the same to the RUC. (TR 446, 517). The RUC prepared an inventory of the weapons it had received from the soldiers, specifying the serial numbers on the guns. (Group Exhibit 4, item 94 at 152). The firearms examiner testified that it was this material that he had subjected to his scrutiny. (TR 111). The absence of the handguns in the photographs

taken of the material that the soldiers found at the farmhouse was not sufficient to prove that the handguns were not there at the time of the arrest. The testimony of the soldiers established the existence of such weapons.[11]

2. The Respondent's abdominal scar was consistent with Constable Elliot's testimony that he had wounded him on July 26, 1975

The Respondent bears an abdominal scar caused by a bullet wound. (Group Exhibit 4, item 160 at 309; Group Exhibit 8, item 9; TR 182). This fact constituted corroboration of Constable Elliot's identification of the Respondent on February 18, 1976, as one of the four assailants in the assault on him and Constable McPhearson, since he had testified that he had shot one of them in the abdomen. (TR 394)[12]

While agreeing that he bears such a scar, the Respondent attempted to provide another explanation for its existence. The scar, he alleged, is the result of a sectarian attack upon him in 1974, when he was hiding in the home of friends. (TR 216). He was allegedly unarmed. When the gunmen entered

---

[11] The Service maintained that photographs of the handguns "simply cannot be found" twenty-four years after the fact. (Exhibit 14 at l 8).

[12] The Respondent purported to find equivocation by Constable Elliot regarding the area where he had wounded his assailant. (Exhibit 13 at 15, referencing TR 394 at lines 3 - 20). But further in his testimony Constable Elliot made clear by gesturing that the wound was in the area of the attacker's "stomach to abdomen". (TR 394 at lines 19 - 23).

the house, "I was slipping out..." (TR 217). Before he could do so, however, "they shot me in the house". (TR 217).

The Respondent's account of this alleged occurrence failed, however, to address certain reasonable questions. He was allegedly shot "in the house on my way out of it" by gunmen who were "behind me". (TR 217 - 18). That would not, however, comport with the medical evidence that his abdominal scar was caused by a bullet that entered "the left lower abdomen" and exited "the posterior left flank". (Group Exhibit 8, item 9). When confronted with this anomaly, the Respondent alleged that on his way out of the house he had supposedly turned to face his pursuer and "then I turned and got to the door". (TR 218). Sensing that it strained credulity to believe that anyone would pause to face his attacker while desperately attempting to flee, the Respondent changed his story. He then alleged that he had stood at an angle to the assailant, trying "to look at who was coming" while unlocking"the back door to get out". (TR 222). This still failed to explain the nature of his wound, which, by its nature, required confrontation with the shooter. It also could not explain how he could have received shotgun pellets in his right arm (TR 220) during this attack, since that arm would have been necessarily shielded by his body in order to receive a shot in his "left lower abdomen". (Group Exhibit 8, item 9; TR 223). Pressed for an answer on this matter, the Respondent replied enigmatically: "I just can't recall every detail of what happened". (TR 223). His description of the events following this alleged shooting also left a question unanswered as to how his claim that he "ran for my life" could be reconciled with his allegation that he had to be carried away from the scene. (TR 217, 245 - 48).

There were absolutely no records to substantiate the alleged attack upon the Respondent in 1974, casting into

doubt the authenticity of this assertion. No police record existed of such an attack allegedly because "we didn't know if it was the police that did it or not". (TR 220). According to the Respondent, he was a peaceful member of the Northern Ireland Civil Rights Association in 1974. (TR 168, 212, 250). Allegedly he was "on the run from internment", (TR 224 - 226), that is to say, a "round up" of civil rights activists by the authorities in Northern Ireland. (TR 168). When allegedly wounded in 1974, he could not seek medical treatment in Northern Ireland, supposedly for fear that the authorities would place him in "internment". This made sense. (TR 250). But that he had to seek medical treatment in the Republic of Ireland from clandestine doctors did not. (TR 214-15). A citizen of the Republic of Ireland wounded in Ulster would have had no reason to fear "the secret police in the Republic of Ireland" if he had been only a civil rights activist (TR 215); no physician in the Republic would have had reason to fear "harassment by the police" (TR 214) for treating such an individual. (TR 796). The absence of medical records showing treatment of the Respondent for gunshot wounds in 1974 was a relevant factor that detracted from the credibility of his claim in this regard.

3. Constable Elliot identified the Respondent as one of his assailants

In the Respondent's view, no RUC official can be trusted to tell the truth, since the RUC is not a police force but a combatant in the conflict in Northern Ireland steeped in responsibility for alleged crimes and atrocities against the Catholic nationalist inhabitants of that troubled country. (Group Exhibit 6, items 1, 1.1, 1.3, item 3; TR 942 - 74, 982 - 95; 1067 - 1114; 1128 - 29). It has allegedly colluded with loyalist para-military organizations in adverse actions against the Catholic nationalist population. (TR 207). The Respondent

urged that the RUC be viewed as the armed wing of unionism with an alleged record of bigotry and sectarianism. The Service produced evidence that sharply contradicted this view. (TR 800- 01,843 -49, 857 - 59, 864 -65, 867 -68, 885 - 91, 893). The RUC officers who testified in Immigration Court, however, appeared in person and subjected themselves to thorough cross - examination. As with any witness who testifies in Immigration Court, their evidence must be examined for its credibility. To be so, testimony must be plausible, detailed, internally consistent, and unembellished. *See e.g., Matter of O-D-*, Interim Decision 3334 (BIA 1998); *Matter of Mogharrabi*, 19 I & N Dec. 439 (BIA 1987). The testimony of the RUC officials can neither be perfunctorily credited nor dismissed; it must be evaluated on its own merits.

There was not a shred of evidence in this voluminous record that implicated Constables Elliot or McPhearson in any of the alleged misdeeds of the RUC. Constable Elliot came before the Immigration Court with a demeanor that tended to show he was a truthful witness. No contradictions or discrepancies came to light to indicate otherwise. Indeed, the record of evidence corroborated his testimony regarding the theft of his weapon on June 27, 1975, and the assault upon himself and Constable McPhearson in the following month. There was no sign of embellishment in his detailed and coherent testimony.

Certainly Constable Elliot had an opportunity to observe the Respondent on July 26, 1975: he confronted and wounded him at a distance of only fifteen feet. (TR 313 - 14, 343, 354). It was precisely the type of traumatic event that could cause a person to have "remarkable memory", that is to say, "a memory which happens in a very highly intense circumstance in which a person clearly over a long period of time can retain

and then recall that information". (TR 1184 - 85, 1195). Constable Elliot never equivocated in his testimony that the Respondent was one of the four assailants. (TR 355, 372, 393 - 94). Even the Respondent's psychologist acknowledged that Constable Elliot, as a trained law enforcement officer (TR 1188, I191), could have made an accurate identification of the Respondent on the day of the assault (TR 1198), despite the stress and effect of his wounds. (TR 1187, 1189 - 94, 1196).

In this case, Constable Elliott did not have to wait long to make his identification of the Respondent. Eight months after the incident, he identified him in the array assembled at the Coleraine RUC station. Unlike Constable Elliot, however, one of the Respondent's witnesses charged the RUC officer who conducted the identification procedure with responsibility for abuse of Catholic nationalists in Northern Ireland (TR 960, 962, 969), a factor requiring caution in assessing the credibility of that officer's testimony. Moreover, the Respondent alleged that there had been several factors that made his identification unreliable: specifically, he had uncut hair, no footwear, clothing that was "far too big for me," had not been permitted to bath, and bore the marks of alleged physical abuse he suffered while in custody. (TR 1227). The others in the array, in contrast, "were looking pretty good, they were dressed pretty good". (TR 1228). What is more, contrary to the testimony of the RUC officer who assembled the array, he was allegedly not permitted to choose his location. (TR 1229). Finally, the Respondent argued, forensic psychologists have questioned the reliability of eyewitness identifications in general, leading the U.S. Attorney General to consider guidelines for proper use of such procedures. (Group Exhibit 12, item 3 for identification; TR 1200- 04).

There was a significant, indisputable reason, however, that invested Constable Elliot's identification of the

Respondent with cogency, notwithstanding the various objections to it. Specifically, three competent, credible facts corroborated Constable Elliot's identification of the Respondent. It was no mere coincidence that he had identified an individual found in possession of weapons used in the July 26, 1975, assault, who had a scar consistent with Constable Elliot's wounding of one of the assailants, and who, as we shall see below, had belonged to an insurgent organization that sought to obtain weapons by attacks on security forces in Northern Ireland. If this case had rested solely upon Constable Elliot's identification of the Respondent in 1976, then, perhaps, the objections to the reliability of the identification could have placed the matter in doubt. But with the corroboration presented in this case, no reasonable doubt existed on this issue.

The dissident opinion of the Respondent's psychologist regarding the identification was not persuasive. (TR 1204-05). He was not present at the identification and, thus, had no first-hand information regarding it, whereas the two RUC officers were. They alleged that, contrary to the hypothetical posed to the psychologist (TR 1204 - 05), the Respondent had been similar in size and appearance to the others in the identification array. (TR 541 - 42). Constable Elliot did not detect any differences in the Respondent's appearance on the day of the identification. (TR 322 - 325, 352). Contradicting his earlier testimony that a trained law enforcement officer could have had a vivid recollection of his assailant, the psychologist opined that Constable Elliot's identification might have been "devoid of the requisite attention or focus for the information to be accurately retrieved on some subsequent lineup". (TR 1207). But he then admitted that Constable Elliot "did an incredible job", (TR 1208), once again acknowledging that it was possible for him to have seen the Respondent during the assault and identified him

subsequently. (TR 1195-96). He assumed facts not in evidence to denigrate Constable Elliot's identification. For example, he assumed that "the officer who called the witness in was a very high ranking person who said there are suspects in the room" (TR 1208) and that Constable Elliot had a predisposition to identify someone to bring "closure" to his "sense of trauma". (TR 1209). But Constable Elliot testified that his mother had summoned him by telephone from Scotland to attend the identification and not a "high-ranking person"(TR 321). It was questionable whether an inspector, (TR 344), which was then the rank of the RUC officer who conducted the identification procedure, would necessarily have impressed Constable Elliot as a "very high - ranking" officer, especially since he did not work under his command. (TR 325, 1214). There was no evidence that the officer conducting the identification procedure told Constable Elliot that there was a suspect in the room, although, as with any witness summoned for such an occasion, he assumed there was. (TR 323 - 26, 546 - 47). No matter how much he may have wished to identify a suspect, Constable Elliot identified one for whom corroborating evidence existed, evidence that the psychologist who impugned his testimony never even bothered to consider. (TR 1119).

Recognizing the substantial probative value of Constable Elliot's identification of him in 1976, the Respondent complained that he had not been allowed a fair opportunity to cross-examine this key witness because certain alleged statements he may have given in other related cases in Northern Ireland had not been furnished to him. (TR 375 - 76, 411, 419, 421). After careful review of this issue, the Immigration Court found no reason to believe that Constable Elliot had ever given statements or testimony in Northern Ireland that differed from the evidence he had provided in the deportation proceedings.

This record contains a total of four statements given by Constable Elliot, two regarding the June 27, 1975, incident, and two regarding the one on July 26, 1975.[13] Was there anything about these statements - - their dates, content or manner of preparation - - that suggested the possibility that Constable Elliot may have given other conflicting ones regarding these incidents? The Immigration Court found nothing.

All of these statements are accurate typewritten versions of initial handwritten ones, with no reason shown in the evidence to doubt the faithfulness of the transcriptions. Each of the RUC officers who testified explained that the practice in the agency had been for this procedure to be followed[14] (TR 396, 398 - 99, 414, 418, 549 - 50, 552 - 53, 575 - 78, 588 - 90). In many instances it was a practical necessity, as, for example, when Constable Elliot gave his statement regarding

---

[13] The four statements are: 1) statement dated May 8, 1979, regarding the June 27, 1975, incident (Group Exhibit 8, item 1); 2) statement dated May 5, 1979, regarding the same incident (Group Exhibit 8, item 2); unsigned statement of February 18, 1976, regarding the July 26, 1975, incident (Group Exhibit 4, item 5 at 5); and, statement regarding the July 26, 1975, incident signed by Constable Elliot on August 16, 1975 (Group Exhibit 4, item 62 at 90-91).

[14] Examples of this procedure are found in the following documents. Exhibit 8, item 6, is the handwritten version of the statement of the RUC officer who conducted the identification procedure; the typed version is Group Exhibit 4, item 32 at 46. The same officer handwrote the statement signed by Constable Elliot regarding the identification procedure. (Group Exhibit 8, item 7). This was subsequently typed but not signed by Constable Elliot. (Group Exhibit 4, item 5 at 6 - 7). Group Exhibit 4, item 49 at 71 is the typewritten version of Group Exhibit 4, item 50 at 72.

the July 26, 1975, incident while in the hospital where a typed statement could not immediately be prepared. (Group Exhibit 4, item 62 at 90- 91).

The fact that statements were re-typed on forms required for their use as evidence on a later date in another proceeding also failed to prove the existence of conflicting statements by Constable Elliot. (Group Exhibit 8, items 1 and 2). He testified repeatedly and adamantly that these later renditions had not been altered in any way and in fact contained the "exact same words" as previous versions (TR 366, 368 - 69, 380, 396 - 98, 402 - 408); that he had made no other statements in regard to the incident on June 27, 1975[15] (TR 409, 412, 414, 416 - 417); and, that he had never given any other statement regarding the July 26, 1975, incident. (TR 416). Similarly, the fact that an RUC officer combined Constable Elliot's statement regarding his identification of the Respondent on February 18, 1976, with his statement of August 16, 1975, regarding the attack on the constables, did not indicate that Constable Elliot gave any other statements.[16] (TR 364-65; Group Exhibit 4, item 62 at 90-91).

In fact, the examination of Constable Elliot regarding these statements and the alleged possibility of others consumed no less than sixty-three pages of the transcript, (TR 356-419), the most intense and lengthy examination of any occurrence witness in this case. And at the end of this

---

[15] Even if it could have been shown that Constable Elliot gave a conflicting statement regarding the June 27, 1975, incident, it would not have impeached his identification of the Respondent arising from the July 26, 1975, assault on the constables.

[16] Constable Elliot never signed the composite statement that had been prepared for him. (Group Exhibit 4, item 5 at 5).

exhaustive examination it was clear that "all we have...is his statement and testimony". (TR 411). But we have more. The Service's attorney represented that after having "diligently" examined the records of the RUC during a trip to Northern Ireland for this purpose, he had found "no other statements" by Constable Elliot. (TR 422, 420).

The Respondent's insatiable suspicion that Constable Elliot may have given a conflicting statement in another legal proceeding in Northern Ireland was based upon a faulty premise. In his view, an individual by the name of James G. McDowall, also known as Dowdall, was the "shooter" and, therefore, Constable Elliot's identification of the Respondent cannot possibly be correct. (TR 423). According to the Respondent, Constable Elliot saw Dowdall and not him on the day of the shooting. (Exhibit 13 at 12). But there were four "shooters" in the assault upon the constables. So, even if Constable Elliot had identified Dowdall as one of them, there is no logical reason why he could not have made an equally valid identification of the Respondent as a member of this group of assailants. Proposing Dowdall as a substitute for himself in the 1975 assault was not persuasive, since Dowdall did not have an abdominal bullet wound at the time of this incident. (TR 586). The man Constable Elliot identified in 1976 had such a wound, consistent with his identification of the Respondent. In any event, the whole notion of a conflicting statement having been given by Constable Elliot in another case in Northern Ireland has been shown to be nothing more than a chimera.

Throughout these contentious proceedings the Immigration Court has stated that it would accord no probative weight to statements of witnesses not offered for cross-examination, despite the principle that hearsay is admissible in administrative proceedings. *See e.g., Matter of Mejia*, 16

I & N Dec. 6 (BIA 1976). The acrimonious disputes regarding the veracity of the witnesses in this case, and the extraordinary difficulties involved in this adjudication, confirmed the Court's view that testimony not subjected to cross - examination could not possibly be regarded as reasonable, substantial and probative evidence. *See* section 242(b)(4) of the Act. Hence, the Immigration Court accorded no weight to the statements of Thomas F. McCloskey purporting to implicate the Respondent in the assault on the constables. (Group Exhibit 4, items 73- 75 at 105 -10). The same is true of all of the evidence in this record not subjected to cross - examination. (Exhibit 16, Index to Exhibits shows whether cross-examination occurred).

4. The Respondent was a member of an insurgent organization that engaged in attacks upon security officials to obtain weapons

By asking for and receiving permission to enter the INLA compound at Maze prison in 1976, the Respondent effectively admitted his association with that insurgent organization. Short of weapons to carry on its violent activities in Northern Ireland in the mid - 1970's, INLA staged attacks upon security forces with the objective of seizing their weapons. (TR 582, 591; Group Exhibit 4 at 82 - 119; 260; 268 - 308). The respondent's association with such an organization in 1976 further corroborated Constable Elliot's identification of him.

Once again, however, the Respondent attempted to foist upon the Court an alternative explanation for this matter, one designed to absolve him of any relationship to INLA. According to the Respondent, a prisoner in Northern Ireland in 1976 need only have asked and the authorities would have allowed him to "elect" which prison he would go. (TR 183).

He allegedly chose to enter the INLA compound at Maze not because he was a member of that organization (TR 205) but because he knew prisoners there. (TR 183). Allegedly the inmates in the INLA compound were not necessarily INLA members (TR 189); and, he politely refrained from asking any of them if they were. (TR 197, 209). Since there were allegedly no other compounds at Maze for Catholics, he supposedly had no alternative but to house himself at the one occupied by INLA.

To pretend that the prison commander of INLA in Maze would allow the Respondent into his compound for the sake of fellowship was an affront to the facts. Maze was a prisoner of war camp. Only prisoners with a reasonable claim to "political status" had any expectation of going there. (TR 647 - 48). The prison commander of INLA had the right to accept or reject applicants into his compound. Those accepted were not only Catholic nationalists but members or associates of INLA. (TR634-35, 640-41, 651-52). Prisoners with no affiliation with a para-military group were detained at Belfast prison and not Maze. (TR 635). In fact, a Catholic nationalist seeking admission into Maze had choices other than the INLA compound or the loyalist ones. The official Irish Republican Army (hereinafter "IRA") had a compound at Maze as well as the Provisional Irish Republican Army (hereinafter "PIRA"). (TR 649).

It is reasonable to believe that the Respondent was associated with INLA considering the circumstances. Maze was a dangerous place. Inmates have been killed while confined there by other inmates. (TR 656 - 57). The INLA commanders at the prison would have had to be concerned with security and for that reason would not have accepted any but a trusted colleague. At the time the Respondent sought admission into the INLA compound, they were planning the

escape in which the Respondent participated. Was it likely that the INLA commander would have accepted an outsider into his compound just because he had friends there and wanted to be with them? The question is rhetorical.

The Respondent's pretense that his imprisonment in the INLA compound did not bespeak his membership in that organization conflicted with the evidence of two witnesses, one of whom had long personal experience with the operation of Maze prison. (TR 626 - 666, 756, 783 - 93, 808 09, 859 - 61). The Respondent's expert witness on the political situation in Northern Ireland, on the other hand, had no comparable basis of experience regarding Maze. His field of expertise was Irish and English law. (TR 1063). His allegation that political status did not necessarily mean that a prisoner was a member of a para- military group depended for its validity upon interviews with unnamed inmates and "reading that I've done," (TR 1088), too slender a basis upon which to contradict one of the jailors with long experience at Maze.

The Respondent incorrectly argued that the prison warden had agreed with him that imprisonment in Maze did not necessarily mean that he had been affiliated with INLA. (Exhibit 13 at 10). To reach this fallacious conclusion, which utterly contradicted the clear meaning of the warden's testimony, the Respondent pointed to the colloquy at page 648 of the transcript.

Specifically:

> Q. Now, if someone went out and committed an offense which looked like a political offense they could claim to be political. They didn't have to be affiliated at the time of the offense, did they?

A. No, they may not have been.

Q. They may not have been?

A. They may not have been.

The Respondent omitted, however, to consider the interchange that immediately followed:

Q. And if they claim to be political, and if the officer in charge...accepted them, they were accepted into the compound whether they were members or not?

A. I wouldn't think so, because they would be scared of their own security to bring someone who wasn't affiliated on.

(TR 648 - 49).

The warden testified consistently that no one but an INLA member could have been accepted into the INLA compound.

To raise an issue regarding the veracity of the warden's testimony, the Respondent charged him with complicity in the assassination of a Protestant inmate at Maze ostensibly to prevent him from disclosing collusion by the RUC in atrocities against Catholic nationalists. (Exhibit 13 at 10). The authorities in Northern Ireland conducted an inquest into the death of this inmate in February 1999. (TR 657 - 58). As of the date of this decision, the Respondent has still not offered evidence to substantiate his charge against the warden.

The Respondent's challenge to the credibility of the evidence regarding his deceit of the U.S. Consul likewise provided unavailing. His Application for Immigrant Visa and

Alien Registration showed that he had falsely denied that he had "ever been arrested,..., or confined in a prison...." (Group Exhibit 5, item 2, question numbered 33). The U.S. Consul alleged that the Respondent in two sworn interviews had "claimed that he had never been arrested or confined in prison". (Group Exhibit 5, item 1).

The Respondent's explanation for the misinformation he gave to the U.S. Consul was not convincing. He attempted to shift responsibility to a so - called "Immigration... advisor" who "was filling this out for me", (TR 244), meaning the visa application (Group Exhibit 5, item 2). When asked, however, whether he had been "assisted in completing this application" in 1990, the Respondent replied "no". (Group Exhibit 5, item 2, question numbered 41). Moreover, the U.S. Consul reported no immigration advisor present during his two interviews of the Respondent. (Group Exhibit 5, item 1). Alternatively, the Respondent argued that this denial to the U.S. Consul had been truthful because he does not "recognize" the authority of the RUC to arrest or detain any Catholic nationalist since it is, in his view, a sectarian, illegitimate organization. (TR 201 - 02). But the visa application did not inquire as to whether he had been *lawfully* arrested or imprisoned, an issue to which he could not in any event speak competently. (TR 202). It merely asked whether he had been arrested or imprisoned, making his legal argument inapposite. Assuming, however, that the Respondent had the kind of legal point of view he alleged at the time he applied for his immigrant visa, he would nevertheless have been obliged to set forth this explanation when he answered "no". Anything else was quite simply deceptive. It was incorrect for him to answer categorically "no" regarding previous arrest or imprisonment without simultaneously explaining to the Consul his alleged position regarding the legality of those facts. Finally, the fact that the

Consul had been alerted to the Respondent's record in Northern Ireland before he applied for his visa did not mitigate the deception practiced by the Respondent. (Exhibit 13 at 26).

COUNTRY CONDITIONS

The fateful encounter of Ireland and England began in the 12th century AD., when an Irish chieftain invited an English lord to help him in a power struggle. The English lord married and stayed in Ireland. Other English nobility soon followed and settled in Ireland. King Henry II of England invaded Ireland in 1171 to make sure that these English noblemen remained subservient to his rule.

In 1541, King Henry VIII of England became king of Ireland. The Reformation, during which Henry changed England from a Roman Catholic to a Protestant nation, had little effect on Ireland. English rule there was ineffective, and most Irish people remained Catholics.

In 1607, local Irish chieftains who opposed the English fled from Ulster, a large province in northern Ireland. King James I of England then gave the chieftains' land to English and Scottish Protestants, an action partly responsible for the Protestant majority found in Northern Ireland today.

In the 1600's, efforts to reestablish Catholic power in Ireland proved unsuccessful, the most famous being the Battle of the Boyne, where William of Orange, crowned King William III of England in 1689, defeated former King James II, a Catholic. After this battle, Anglican Protestants owned most of the land in Ireland, controlled Ireland's Parliament, and restricted the rights of Catholics and Presbyterian Protestants alike.

In 1801, the Act of Union took effect, abolishing the Irish Parliament and uniting Great Britain and Ireland. In 1886, the British Liberal Party proposed for Ireland a plan called "Home Rule", whereby Ireland would have remained part of the United Kingdom but with its own parliament for domestic affairs. Ulster Protestants feared that they would lose their rights in a Catholic dominated parliament and opposed the plan. The issue brought the United Kingdom to the brink of civil war until placed in abeyance with the outbreak of World War I.

The political status of Ireland reared itself again in 1916, when a group of Catholic nationalists declared independence in the so-called Easter Uprising. Although suppressed by the British, the political question remained to be addressed. Most Irish Catholics favored complete independence from Britain. But most Protestants in Ulster did not want to be a minority in a Catholic country. In 1919, 73 Irish members of the British Parliament met in Dublin and declared all of Ireland an independent state. Guerilla warfare erupted between the Irish rebels and British forces.

In 1920, the British Parliament passed the Government of Ireland Act, which it hoped would resolve the controversy. The Act divided Ireland into two separate political units and gave some powers of self-government to each. Ulster Protestants accepted the act, and the Province of Northen Ireland was formed from six counties in Ulster. But southern Catholics rejected the act and pressed for complete independence for a single, United Irish republic. In the meanwhile, violence flared in Ireland.

In 1921, southern leaders and the United Kingdom, signed a agreement known as the Anglo Irish treaty that created the

Irish Free State composed of 23 southern counties and 3 counties of Ulster. By 1949, the Free State severed its remaining ties with Britain and became an independent republic.

Catholics who remained in Northern Ireland complained that Protestants discriminated against them in jobs, housing and other areas. Inspired by the civil rights movement in the United States, Catholics (and some Protestants) started to stage demonstrations to express their grievances in 1968. When the Northern Ireland government tried to stop one such demonstration in 1968 in Londonderry, violent riots ensued. Other riots occurred in Belfast. The British government sent troops to Ulster to quell the disturbances but without success. Initially, Catholics in Northern Ireland viewed the troops as protection against loyalist extremists during the civil rights demonstrations. The IRA, however, resented the military's presence and began a campaign of violence. (The World Book Encyclopedia, World Book, Inc., vol. 14 (1998, Chicago).

The years 1969 to 1972 saw a steady deterioration in the situation in Northern Ireland. Para-military groups - - Catholic nationalist and Protestant loyalist - - became increasingly active. Violence became a feature of life in Northern Ireland. The policy of internment of suspected instigators of violence carried out by the authorities in Northern Ireland agitated Catholic nationalist sentiment further. The mounting conflict led the British government to suspend Northern Ireland's government in 1972 and rule the Province directly from London. But the civil disorder continued.

In 1973 and 1982, the United Kingdom established assemblies in Northern Ireland that were designed to restore control over local affairs to the people of the region. But these

efforts were thwarted for lack of cooperation by the two communities. In 1985 an agreement between the governments of the Irish Republic and the United Kingdom pledged both governments to work towards a form of government in Northern Ireland acceptable to all the people of the region. But Unionists and the IRA opposed this agreement and the violence continued. (*Id.*)

To curb the violence by paramilitary groups in Northern Ireland, the British government enacted laws providing increased authority for security officials. It created so-called "Diplock Courts" where cases are heard before one judge instead of a jury on the ground that juries would be intimidated and unable to render impartial verdicts. The PIRA attacked judges and their families. (Country Report (1988) at 1242).

In 1988 the Government of Northern Ireland prohibited radio and television stations from broadcasting interviews or statements of representatives of paramilitary groups that it deemed to be terrorists. While trying to decrease the violence in Northern Ireland, the British government has also tried to ease discrimination of Catholics by Protestants. *See* U.S. Department of State Country Reports for the United Kingdom and Northern Ireland (1988) at 1247 (hereinafter "Country Report").

There are three main sources of the violence in Northern Ireland. Protestant loyalist, Catholic nationalist, and government security forces.

Loyalist paramilitary groups have in some years killed more people in Northern Ireland than comparable Republican groups. They do not distinguish between IRA members and other Catholics. Republican paramilitaries, the largest of

which is PIRA, have been involved in bombings and killings. INLA has also been responsible for such actions. These groups have also operated in the United Kingdom with deadly results. Both Protestant loyalist and Catholic nationalist paramilitary groups also target those within their communities. The 1995 U.S. Department of State Country Report for Northern Ireland stated that loyalist groups have punished members within their groups who have broken rank. Republican paramilitary groups will punish people, including those in the wider Catholic community, for cooperating with security forces.

Placed between the rival combatants and charged with the task of maintaining public order, the RUC is an attractive target for allegations by all sides in the conflict who seek to further their political objectives by such charges. The evidence of the RUC's responsibility to the government, the courts, and domestic and international human rights monitors, however, belies the Respondent's characterization of it as "out of control", (TR 1067, 1128), a "law unto themselves," (TR 1131), and an agency where "brutality" is "tolerated". (TR 1093).

The U.S. Department of State has closely monitored the performance of the RUC. It has never declared it to be other than a civilian police force operating subject to legal restraints. "While concern over aspects of police procedure . . . vis-a-vis Northern Ireland were expressed, the government and judicial system provided avenues for inquiries and remedial action". (Country Report 1988 at 1236).

International human rights organizations, including the United Nations, have also investigated complaints of mistreatment by the RUC. "The Standing Advisory

Commission on Human Rights [of the United Nations] said that, while it was *generally impressed with police arrangements in Northern Ireland* for detention and questioning of suspected terrorists, it remained seriously concerned over the level of complaints involving the RUC". (Country Report 1988 at 1239; Emphasis added). A significant number of these complaints have been determined to be false. (TR 1129). Even the most acerbic critic of the RUC has recognized that "only a small number of people in the RUC" have been responsible for misdeeds. (TR 1129).

Complaints regarding the RUC are also examined by the Independent Commission for Police Complaints (hereinafter "ICPC"). (Country Report 1989 at 1294). The ICPC has been instrumental in disciplining errant police officers and bringing criminal prosecutions against such officers when appropriate. (Country Report 1994 at 1026). The ICPC has, for example, supervised punishment of officers who have harassed inhabitants of Northern Ireland. (*Id.* at 1027).

The government of Northern Ireland controls the RUC. In 1994 a new code of practices became effective that established standards for police interrogation and strengthened oversight requirements. Detainees who claim physical mistreatment have the right to an immediate medical examination and judicial review. (Country Report 1994 at 1026).

The courts in Northern Ireland subject the RUC to the full rigors of the law. When an officer used deadly force in a security incident where the victim was not involved in terrorist activity, the criminal court in Northern Ireland tried the officer responsible. (Country Report 1992 at 958 - 59). Charges against four detainees were dismissed after a court decided that, while there had been no police abuse, the defendants were teenagers who did not understand their

rights. In another case, a court acquitted a defendant who had been charged with murder where there was evidence of police intimidation to coerce a confession. (Country Report 1994 at 1026). The courts released Colin Duffy, accused of responsibility for the murder of two RUC officers, in October 1997 for lack of evidence. (Country Report 1997 at 1378).

Since over ninety-percent of the RUC is Protestant, (TR 857), nationalists allege that it is a sectarian force. But the present chief constable is a Catholic. (TR 893). Catholic recruits are dissuaded from joining the RUC by threats made by PIRA and other such paramilitaries. (TR 858). Loyalists have not exempted the RUC from their wrath. Extremists kicked an RUC officer to death in 1997 and another officer died in 1998 from head injuries received when a blast bomb was thrown at police during Loyalist rioting protesting police refusal to allow parades in Catholic nationalist areas. (Country Report 1997 at 1377; Country Report 1998 at 1595). The RUC has brought criminal charges against all perpetrators of violence in Northern Ireland and not just Catholic nationalists. In 1992 it charged six members of the British army who engaged in confrontations with residents in the town of Coal island in retaliation for a PIRA bombing that mutilated a soldier. (Country Report 1992 at 959).

One witness in this case alleged that the RUC had a "shoot - to - kill" policy with respect to suspected terrorists. (TR 1109, 1125). Indeed, he asserted that the RUC maintains "shoot- to - kill death squads," (TR 1094), culminating in his conclusion that the RUC is a Protestant "para-military force" disguised as a police department. (TR 1131). Let us examine the facts. A number of fatal shootings beginning in 1982 involving members of the RUC and the British Army gave rise to allegations, including those in Amnesty International's 1987 Report, that security forces in Northern Ireland

practiced a "shoot - to - kill" policy in regard to suspected terrorists. Delay in the investigation of these charges led as well to allegations of a cover-up by senior police officers. (Country Report 1987 at 1070). Four RUC officers involved in these suspicious shootings were tried for murder and acquitted. (Country Report 1988 at 1237). An investigation revealed "no evidence of instructions to any RUC officer in Northern Ireland to use other than legitimate methods to bring offenders to justice". (*Id.*) Eventually the British government acknowledged evidence of "perverting or attempting to pervert the course of justice" by RUC officials. While no criminal charges were brought, 20 RUC officers faced disciplinary action for hindering the investigation. (*Id.*)

Collusion between the RUC and Protestant para-militaries was another claim made by the same witness. (TR 112 - 13). In 1989 there were revelations that security force documents identifying alleged PIRA suspects and others were allowed to come into the possession of Protestant terrorists who used them to identify targets for attacks. (Country Report 1989 at 1293). In 1990 an independent police investigation of these allegations concluded that, although such incidents had occurred, "the practice was neither widespread nor institutionalized". (Country Report 1990 at 1326).

The same witness declared that the RUC "ran agents in the Loyalist paramilitary force that killed Pat Finucane," an attorney who defended IRA suspects. In the febrile atmosphere of conflict, charges and counter-charges are constantly hurled. The facts do not, however, yet support this claim. "The 1989 killing of Patrick Finucane, counsel to many IRA suspects, remains an open case. Although it was widely alleged that Brian Nelson, a former Loyalist paramilitary and agent for British military intelligence, assisted in targeting Finucane, the Northern Ireland DPP

[Director of Public Prosecutions] determined that the evidence was insufficient and decided not to bring charges against him". (Country Report 1996 at 1192). The authorities released him from prison in February 1996. (*Id.*) Finucane's widow is pursuing a civil suit against Nelson and the British Ministry of Defense seeking damages for her husband's wrongful death, alleging that the defendants were negligent in the "gathering, recording and keeping safe" of material concerning the decedent. The British government denied the claim. The unresolved status of the Finucane case is "interpreted by a number of human rights organizations as evidence of collusion between government officials and loyalist paramilitary groups" and keeps alive contention between Nationalist groups and the government. A United Nations report is still in progress. (Country Report 1997 at 1377). No conclusive facts have been developed as yet.

The paramilitaries declared a cease fire in 1994. Unfortunately, that did not bring an end to the violence. The RUC continued to be the target of attacks by PIRA. On April 10, 1998, the Good Friday agreement opened a new possibility for peace in Northern Ireland, which has not yet been realized. Even so, the violence, albeit at a lesser level, has continued with tragic results for the people of Northern Ireland. As of the date of this writing, further efforts are being made to make the promise of peace real. Men and women of goodwill, especially in the United States, which shares ties of kinship and sentiment with the long-suffering people of Northern Ireland, look forward anxiously for the day when all of the people of Ireland can enjoy peace and justice, no matter where they live, no matter their creed.

ANALYSIS

1. PRELIMINARY MOTIONS OF THE RESPONDENT

A. The Immigration Court correctly denied the Respondent's motion for a more definite pleading

The charging document in this case gave an adequate notice of allegations against the Respondent. (Exhibit 1C). It set forth a concise statement of the factual allegations that constituted a violation of the law and designated the statutory provisions that the Respondent purportedly violated. *See* 8 C.F.R.242.1(b)(1997). Specifically, in allegations of fact numbered 5 to 9, inclusive, the Service notified the Respondent that it intended to prove that he had engaged "in a gun battle" in which he used a firearm (other than for mere personal gain) with intent to endanger the safety of the two constables. *See* former section 241(a)(1)(A), 24l(a)(4)(B), and 212(a)(3)(B)(i)(I) of the Act.

In addition to the notice in the charging document, the Service, pursuant to Court order, provided the Respondent with the entire documentary record in this case, including the detailed statements of each proposed witness, many months before the hearing, allowing him ample opportunity to learn in particular what acts constituted the "terrorist activity" that the Service intended to prove. (TR 9, 15, 31). To further clarify the nature of the allegations against the Respondent, the immigration Court conducted five pre-hearing conferences in which he had yet more opportunities to acquaint himself with the charges brought against him by the Service. *See* 8 C.F.R.3.21(a)(1997). It is impossible to conceive what more could have been done to place the Respondent on notice regarding the terrorism and fraud charges; and, in particular, the acts that constituted the alleged "terrorist activity". The

clearest possible evidence of the adequacy of the notice was the vigorous defense mounted by the Respondent.

The notice supplied to the Respondent as to his role in the Dungiven incident allowed no alleged confusion on his part. (Exhibit 13 at 9-15). The charging document made it clear that the Service intended to show that he was one of four assailants in the assault on the constables. His purported distinction between the "actor" and "member" is immaterial since an alien is amenable to a charge of terrorism whether he acted individually or as part of a group. *See* section 212(a)(3)(B)(ii)(IV) and (iii) of the Act. So, even if one accepted the Respondent's oft-repeated assertion that it was Dowdall who wounded Constable Elliot and killed his partner, the Respondent's presence in the group of assailants, which provided a competent basis upon which to conclude that he was a co-conspirator, would properly subject him to the terrorism charges nonetheless.

The text of the terrorism statute is clear. *See* former section 212(a)(3)(B)(i)(I). An alien is excludable from the United States if he or she "has engaged in terrorist activity". The Act defines the term "terrorist activity" as "any activity which is unlawful under the laws of the place where it is committed... and which involves", among other things, "[t]he use of any... firearm (other than for mere personal gain), with intent to endanger,..., the safety of one or more individuals,...." As used in the Act, the term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity...", as previously defined. A plain reading of the statue does not result in the "vagueness" alleged by the Respondent. *See Chevron U.S.A. Inc. v Natural Resources Defense Council Inc.*, 467 U.S. 837, 842 - 43 (1994); *INS v. Phinpathya*, 464 U.S. 183 (1984); Exhibit 13 at 4, 8. Nor was

it correct for the Respondent to argue that the present case treats the statutory definition of terrorism as "open - ended and non-exclusive, which yields indefiniteness". (Exhibit 13 at 6). The acts of the Respondent fit precisely into the statutory provision of Congress. He used a firearm to endanger the safety of two individuals for reasons other than mere personal gain.

It was for these reasons that the Court denied the Respondent's motion for a more definite pleading. (Exhibits 10A and B).

B. The Immigration Court correctly denied the Respondent's motion for disclosure of witnesses' prior statements

Although offered before the hearing, the Immigration Court reserved its ruling on this motion until after the Respondent had an opportunity to interrogate Constable Elliot regarding the alleged existence of other statements he may have given. (Exhibit 10C and D). For the reasons set forth in the above-discussion regarding credibility (at item 3), the Immigration Court will hereby deny this motion for want of credible evidence that Constable Elliot gave any statements other than the ones in this record. Obviously, therefore, the Respondent was incorrect when he charged that the Court had relied solely upon the representation of the Service's counsel that no other statements existed. (Exhibit 13 at 17).

C. The Immigration Court correctly denied the Respondent's motion for disclosure of evidence in Respondent's favor

This motion requested the Immigration Court to order the U.S. Secretary of State to explain why she did not designate

INLA as a terrorist organization in her notice dated October 8, 1997. Further, the Respondent sought, as part of such a proposed order, information regarding "the U.S. position on the future prosecution of alleged terrorists and on the release of persons convicted of offenses in the Republic of Ireland and in Great Britain related to the conflict between Protestant and Catholic factions in Northern Ireland". (Exhibits 10E and F).

Nothing in the Act, regulations, or case law gives the Immigration Court - - an administrative forum - - the authority to enter such an order. Assuming that the Court had such authority, there would nevertheless be no reason to make such an order in this case, since the information sought by the Respondent is not relevant to any material issue in this case. *See Matter of Escobar*, 16 I & N Dec. 52 (BIA 1976) (subpoena for records may be denied where petitioner fails to show requested evidence is essential).

Section 219 of the Act, the provision under which the Secretary of State is required to designate foreign terrorist organizations, is not necessarily a predicate for the operation of the terrorism provision set forth in section 212(a)(3)(B) of the Act. Except for sections 212(a)(3)(B)(i)(IV) and (V), the other provisions of the terrorism statute are effective whether or not the Secretary of State has designated a foreign organization as one that engages in terrorist activity. Even when there has been no such designation, the Service, nevertheless, could proceed if it has evidence that an individual acting alone or in a conspiracy is inadmissible for engaging in terrorist activity. *See* section 212(a)(3)(B)(i)(I), (II), (III) of the Act; *see also* section 212 (a)(3)(B)(ii) and 212(a)(3)(B)(iii) of the Act. Nor does the lack of designation preclude proof that an organization engages in terrorist activity. (*Id.*) Unfortunately, such organizations are constantly

developing; the Secretary of State cannot be expected to know of the existence of every such organization. The mere lack of designation cannot be construed as a warrant of good behavior for such organizations that prevents operation of the terrorism ground of exclusion. The purpose of section 219, as shown clearly in its text, is merely to allow the U.S. government to freeze assets of designated foreign terrorist organizations that may be in this country and to exclude representatives or members of such organizations from the Untied States.

It was the Respondent's misconstruction of the relationship between sections 212(a)(3)(B) and 219 of the Act that led to his argument that the question of terrorism is "inherently a political and diplomatic rather than an adjudicative function". (Exhibit 13 at 20). As we have seen, a proper interpretation of these two provisions shows that the Immigration Court is charged with the responsibility of determining whether an alien is excludable as a terrorist pursuant to section 212(a)(3)(B) of the Act, *see* section 103 of the Act; 8 C.F.R.242.8 (1996), whether or not there has been a designation of a foreign organization as terrorist in nature.

D. The Respondent's other preliminary motions were also without merit

The Respondent argued that common crimes, such as murder or bank robbery, do not amount to terrorism because they are not political acts. (Exhibit 13 at 3, 7-8). If such crimes are considered political offenses, then they could not constitute a ground of inadmissibility. *See* former section 212(a)(2)(A)(i)(I) of the Act.

Of course, how an alien is charged is confided to prosecutorial discretion. *See, Matter of Yazdaai*, 17 I & N Dec. 626 (BIA 1981). It was reasonable for the Service to

charge that the Respondent's acts amounted to terrorism rather than charge him with ordinary crimes. Because of his escape, the Service had no records of conviction to prove inadmissibility for conviction of a crime(s) involving moral turpitude. *See* former section 212(a)(2)(A)(i) of the Act. A charge of terrorism avoids the defense of "purely political offense," a fair consideration for the prosecution. (*Id.*) As we shall see below, review of the political situation in Northern Ireland at the time of the events in this case indicated that the Respondent's motivation was in fact political rather than criminal, making it correct to charge him as a terrorist and not a criminal. Finally, the prosecution has a right to take into account what it considers as sound public policy considerations in formulating its charge of deportability.

The Respondent also protested that the two distinct charges involving terrorism brought by the Service are redundant. Here again, however, this touches a matter within the purview of prosecutorial discretion. As we shall see below, an act of terrorist activity properly invokes section 212(a)(3)(B)(i), (ii), and (iii) of the Act.

2. THE TERRORISM CHARGES

Aliens who have engaged in a terrorist activity are inadmissible. *See* section 212(a)(3)(B) of the Act. The Act provides definitions for "terrorist activity" and "engage in terrorist activity." However, the application of these definitions to real life has proved challenging. "Attempts to reach a fixed, universally accepted definition of international terrorism have been frustrated both by changes in terrorist methodology and the lack of any precise definition of the term terrorism." *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 17 (D.C. Cir. 1998) (citing Louis Rene Beres, *The Meaning of Terrorism-Jurisprudential and Definitional*

Clarifications, 28 Vand. J. Transn'l L. 239 (1995)). As discussed below, United States law and international law provide characteristics necessary for an adequate definition of terrorism, but fail to agree on a coherent, comprehensive, and workable definition of the term. In fact, a review of the several definitions that appear in the United States Code reveals some inconsistency even within U.S. law itself. However, by examining United States law and policy, the Court can develop a workable definition of terrorism for purposes of interpreting the Act. We begin with an examination of the history of terrorism in order to establish the context within which the current law developed.

A. History of Terrorism

Although the word "terrorism" is derived from the French and first appeared around the time of the French Revolution, acts of terrorism have occurred throughout recorded history. There exists two broad categories of terrorism: terrorism from above and terrorism from below. Terrorism from above is terrorism sanctioned by the state. Possibly the most well-known example of this type of terrorism is Kristallnacht, or the Night of Broken Glass, wherein the Nazi government encouraged German civilians and soldiers to attack Jewish homes and businesses throughout Germany on November 9, 1938. A more recent example was the 1994 civil war in Rwanda where the Hutu-dominated government planned and orchestrated the murder of thousands of Tutsi civilians. Terrorism from below is terrorism perpetrated by non-government actors. Often times these terrorists have the support of one or more governments, but they generally act independently. Examples of this type of terrorism include the April 19, 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City and the December 21, 1988 bombing of Pan Am Flight 103.

"Terrorism from below has emerged in many different forms and out of such various motivations as religious protest movements, political revolts, and social uprisings." Laqueur, Walter, *The Age of Terrorism* 12 (Little Brown & Co. 1987). One of the earliest known examples of such terrorists were the *Sicarii,* anti-Roman religious zealots who attacked Romans, Jewish moderates, and the wealthy in Palestine between 66 and 73 AD. The *Sicarii* murdered their targets often in broad daylight, and when there were crowds of people present. Afterward, they would conceal themselves amidst the crowd. The *Sicarii* attacked the homes of public officials, burned the public archives in order to destroy public debt records, burned granaries, and sabotaged the water supplies of Jerusalem. *Id.* at 12-13. A more long lasting and better known group of terrorists appeared in the late 11th century. The Hashshashin, or Assassins, were based in Persia; they killed their victims with knives. Steele, Philip, *Past and Present Terrorism* 10-11 (Heinemann Educational Books 1992). They operated in secrecy, usually in disguise. The leader of the Assassins early on recognized that they did not have sufficient numbers to defend their way of life openly. They adopted their terrorist tactics in order to defend their religious autonomy. Laqueur at 13. Ultimately, however, they were suppressed by the Mongols around 1272.

There were many secret societies through history that engaged in terrorist-like activities. The English word "thug", for example, derives from a clandestine group, the Thugs, in northern India who were known for strangling their enemies with silk ties. *Id.; see also American Heritage Dictionary* 2d ed. 1267 (Houghton Mifflin Co. 1985). China also had its share of secret societies - among river pirates, outlaws in the hills, and respectable city dwellers. Laqueur at 14. These groups ultimately participated in the Boxer rebellion around the turn of the century and provided early support to Sun Yat-

sen. *Id.* One of the most well known terrorist groups in the United States was formed after the defeat of the Confederacy in the Civil War. Throughout its early history, the Ku Klux Klan terrorized and murdered southern Blacks. Nash, Jay Robert, *Terrorism in the 20th Century* 65 (M. Evans and Co. 1998). The organization disbanded with the end of Reconstruction in 1877 and was not recreated until the 1910s.

All of these groups--the *Sicarii*, the Assassins, the various secret societies, and the early KKK--were precursors to the modern, political terrorist movements that emerged in the late 19th century and proliferated during the present century. The modern era of terrorism dawned in Russia in the 1870's and 1880's. There, social revolutionaries perpetrated a series of assassinations designed to foment political change. The assassinations climaxed with the murder of Czar Alexander II in 1881 by a group called the *Narodnaya Volya* ("People's Will"). Others around Europe and in the United States followed the example of the Russian revolutionaries. In the last quarter of the 19th century, terrorists threw a bottle of acid into the Paris stock exchange, and exploded bombs in Chicago's Haymarket Square (thus precipitating the famous riot), a Barcelona theater, and the French Chamber of Deputies in Paris. Most of these attacks were carried out by men and women who purported to represent the poor, politically powerless, working class people. Also in the late 19th century, a series of assassinations, mostly carded out by self-proclaimed anarchists, resulted in the deaths of many important world leaders: President Sadi-Camot of France in 1894, Empress Elisabeth of Austria in 1898; King Umberto I of Italy in 1900, and President McKinley of the United States in 1901. The most dramatic and far-reaching assassination during this period occurred in 1914 when a Serbian nationalist murdered Arch Duke Franz Ferdinand and

his wife, heirs to the throne of Austria-Hungary. In short order, this assassination ignited the First World War.

Although the assassinations and bombings during the prewar period were often spectacular, there existed no systematic campaign of terror in Central and Western Europe prior to World War I. Terrorism in Russia and Spain during the prewar years was more systematic and resulted in a heavier loss of life. Such terror was usually part of broader revolutionary movements, and was often cloaked in anarchism, communism or nationalist separatism. In the United States, the systematic terrorism, such as it was, occurred in relation to the labor disputes of the late 19th and early 20th centuries. Some of the more notorious terrorist incidents in the United States were the assassination of the governor of Idaho in 1905, possibly by the Industrial Workers of the World (IWW), and the bombing of the Los Angeles Times Building in 1910. Terrorism in the United States during this period was "limited in scope and purpose; there was no intention of overthrowing the government, killing the political leadership or changing the political system." Laqueur at 19.

Prior to World War I, a number of nationalist-separatist groups began to gain prominence. Such groups existed in many countries--Ireland, Macedonia, Armenia, Bengal and often loosely adhered to left wing ideologies, such as communism and anarchism. After the war, such groups became more blatantly nationalistic and were less concerned with any particular ideology. In any case, the period between the world wars was one of relatively little terrorist activity. This was an age of mass parties--Communists and Fascists competed for followers throughout Europe. The mass parties were certainly not above using terrorism to further their ends,

but it was not the type of terrorism from below with which we are here concerned.

Several notable, terrorist organizations did emerge prior to the Second World War. The Muslim Brotherhood in Egypt and the Irgun and Stern Gang in Palestine both used terrorism prior to the war. During the war, there were terrorist attacks against German occupiers, including several assassinations and bombings. The terrorism of the period, however, paled when compared to the wide scale atrocities committed by the German government. Overall, the terrorism perpetrated during the war had little effect on the outcome.

After the war, terrorism became a more visible phenomena as various colonized peoples struggled for independence and as regional and cold war rivalries caused countries to support terrorism in the hope of furthering wider political objectives. Probably the first major post-war terrorist campaign took place in Palestine. There, several Jewish groups committed acts of terrorism against the British, Arabs, and other Jews. The most notable attack was the bombing of the King David Hotel in 1946. Twenty Eight British, 41 Palestinian Arabs, and 17 Jews were killed. Steele at 24. Terrorists also attacked the British colonialists in Cyprus and Yemen. All of these terrorist campaigns were ultimately successful, at least in the sense that the British abandoned their colonies. The anti-colonial struggles of the post-war period were fertile breeding grounds for terrorists. The Man Mau in Kenya, the Algerian National Liberation Front, and the Viet Minh in Vietnam are some of the more well known insurgent groups which also engaged in terrorism.

With a few exceptions, most of the terrorist and guerilla groups extant during the first two decades after World War II operated in the countryside. Revolutionary theorists, such as

Mao Tse-tung, Fidel Castro, and Che Guevara, believed this was as it should be. They regarded the city as the "graveyard" of the revolutionary freedom fighter. *See* Laqueur at 23. "It was only in the middle 1960s that urban terrorism came into its own--mainly as the result of the defeat of the rural guerillas in Latin America but also following the emergence (or in some cases the reactivation)of urban terrorist groups in Europe, North America, and Japan." *Id.*

The terrorism that has existed from the 1960s until today can be broadly grouped into several different categories. First, there is the nationalist-separatist terrorism such as the Catholics in Northern Ireland, the Palestinians in Israel, and the Basques in Spain. These are probably the most visible terrorist groups today. They are also among the most well funded and the most long lasting. The IRA, for example, had a 1975 budget estimated at between $1 and $3 million and Fatah, the largest faction of the Palestine Liberation Organization, had a budget estimated at between $150 and $200 million for that same year. *See* Laqueur at 102. In the case of the Palestinians, much of this support comes from Arab governments. The IRA, on the other hand, receives support from Irish Catholics in Ireland and abroad, as well as through legitimate businesses and criminal activity. Both of these organizations have been in existence for over 30 years: the PIRA was founded in 1969, and the PLO came into existence in 1964. One characteristic of the nationalist-separatist terrorists that distinguishes them from earlier groups is that they often commit violence against civilians who have no involvement with the conflict at hand. The various Palestinian liberation groups, for example, were responsible for more attacks against Arab leaders than against Israelis.

A second category of terrorists are the Latin American terrorists. These were generally part of larger insurgent movements and, at least in Central America, are now largely defunct. These terrorist organizations often espoused Marxist-Leninist views and have provided inspiration for many of the Left wing urban terrorism in the Western Democracies. The urban terrorists in Caracas, Venezuela in 1962-63 first developed many of the terrorist techniques (hijacking planes and boats, bank robbery, kidnaping prominent people) that were later adopted by other groups all over the world. By 1967, after the death of Che Guevara, rebel leaders became convinced that rural guerilla warfare could not succeed in causing political change. After that year, the focus shifted to urban terrorism, particularly in Uruguay, Brazil, and Argentina. These terrorists were innovative in their use of terrorist acts to gain media attention and in establishing organizational links between different terrorist groups. By the late 1970s, terrorism in Latin America was in decline. There are still terrorists active in Latin America; most notably those associated with insurgent movements in Columbia and Peru. These groups, particularly those in Columbia, are known for their close cooperation with drug dealers.

The third group consists of the urban terrorists of Western Europe, North America, and Japan. These terrorists often held extreme leftist views, or at least used the language and mythology of the Left. Examples of these terrorist organizations include the Baader-Meinhof Gang in West Germany, the Symbionese Liberation Army in the United States, and the Japanese Red Army. The rise and decline of these organizations was closely associated with the rise and decline of the Leftist and radical movements on university campuses throughout the West in the 1960s and 1970s. Although these groups attained widespread notoriety, they accomplished little, particularly in the United States. Only the

Red Brigade in Italy and groups like the Turkish Liberation Army in Turkey had any significant political impact.

A fourth category of terrorists groups are the extreme right wing, or semi-Fascist terrorists. As with the Left wing terrorist, terrorists of the Right often use that label without great regard for their own philosophic perspective. Right wing terrorism reached its peak in Italy in 1983-84, when roughly half of those arrested for terrorist acts subscribed to Right wing views. In 1982, there were 238 Right wing terrorists in Italian jails. Right wing terrorists have operated in other countries as well, such as Germany and France, where their targets are often Jews and foreign workers. In the United States, Right wing terrorists were not as visible as their European counterparts during the 1960s through the 1980s. However, the Oklahoma city bombing, numerous attacks on abortion clinics, and the Olympic Park bombing in Atlanta have thrust Right wing terrorism into the headlines.

Finally, there are those terrorists who act as individuals, completely without connection to any organized group. An example of such a terrorist is the Unabomber, Theodore Kaczynski. Such terrorists can be effective because they are unpredictable and because advances in technology have allowed individuals to obtain explosives and weapons capable of doing great harm. As with most terrorists, these individual terrorists often express an ideology. However, they rarely obtain the support of those organizations with whom they claim to be ideological kin. Although the acts of such terrorists are often spectacular, they are almost never able to effect any sort of political change.

B. The Law of Terrorism

It is in the context of these terrorist activities that Congress developed the current laws related to removal of alien terrorists. In amending the Act to include a provision making terrorists excludable, Congress provided the following explanation:

> The committee of conference notes that current law provides authority to the executive branch to deny admission to aliens or to deport them on a variety of grounds including those related to national security, ideological or political beliefs, and, more generally, the interests of the United States (8 U.S.C. 1182(a)). These provisions, since their codification in 1952 as part of the Immigration and Nationality Act, have been used by the executive branch to deny aliens entry into the United States on the basis not only of their potential threat to the national security interests of the United States or their past involvement in criminal activity, but also on the basis of their expression of beliefs, their advocacy of political positions, or their association in political organizations which would be constitutionally protected if engaged in by U.S. citizens within the United States.
>
> * * * *
>
> The conference substitute continues to [permit] the denial of visas or the deportation of aliens when it is in the interests of the United States, but makes it clear that it is not in the interests of the United States to establish one standard of ideology for citizens and another for foreigners who wish to visit the United States. Accordingly, under this section the executive

branch would retain the ability to exclude or deport aliens on criminal, espionage, and terrorism grounds (among others), and, in certain circumstances, on national security and foreign policy grounds. But national security or foreign policy exclusion or deportation would not be permitted if such exclusion or deportation were based on beliefs, statements, or associations which would be constitutionally protected if engaged in by U.S. citizens in the United States. Under this section, statements would be construed as including writings and other forms of non-verbal communications.

* * * *

Notwithstanding the general prohibition on exclusion or deportation because of constitutionally protected activities, the executive branch would retain the discretionary power to exclude or deport in certain limited circumstances. First, exclusion or deportation would be appropriate in the case of an individual who has committed or who is likely to engage after entry in terrorist activity. In considering whether a person has been involved in terrorist activities under paragraph (b)(2), it is the intent of the managers to include persons involved in hostage taking, kidnaping, threatened violence or other acts which do not actually involve death or injury. These acts, whether or not they actually result in bodily harm, are a form of violence and are crimes. The managers also consider that organizing, abetting, or participating in terrorist acts or activities would include not only actually pulling a trigger or planting a bomb but providing support or assistance, such as but not limited to: planning, providing facilities, recruiting, financing or

> fundraising, surveillance, courier service, transportation, providing weapons, or forging or unlawfully procuring documents. The term 'terrorist activity' as used in paragraph (b)(2) of the substitute is intended to include international, targeted acts of terrorism such as assassination. The phrase "individuals not involved in armed hostilities" as used in paragraph (b)(2) of the substitute is intended to mean noncombatants. An alien would be considered to have participated in an act of terrorism whether he or she did so individually or as a member of an organization.

Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 475, 100th Cong., 1st Sess. 1987, 1987 U.S.C.C.A.N. 2370, 1987 WL 61489 (Leg. Hist.), P.L. 100-204, Foreign Relations Authorization Act, Fiscal Years 1988 and 1989.

The Immigration Act of 1990 amended the Act and added the language in effect today.[17] The Conference Committee Report for that act provides as follows:

> For the purposes of this legislation, the conferees consider terrorist activity to include, but not be limited to, conduct which is prohibited by international conventions relating to terrorism, such as the Convention for the Unlawful Seizure of Aircraft (the

---

[17] The language has been slightly modified since 1990 by, for example, the Immigration Technical Corrections Act of 1991, the Anti-Terrorism and Effective Death Penalty Act, and the Illegal Immigration Reform And Immigrant Responsibility Act. Nevertheless, the essence of the current law was created by the Immigration Act of 1990.

Hague, 1970), the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 1971), the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents (New York, 1973), The Convention Against the Taking of Hostages (New York, 1979), the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation, and the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. Also illustrative of the acts which should be considered terrorist acts for the purpose of this legislation are those which are encompassed within the definition of terrorism contained in Title 22 United States Code, Section 2656f(d). That statute defines terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational or clandestine agents." For the purposes of this legislation, the conferees consider a "terrorist organization" to be one whose leadership, or whose members, with the knowledge, approval or acquiescence of the leadership, have taken part in terrorist activities. In making determinations for the purpose of establishing excludability, the Department of State (or the Immigration Service when appropriate) should take into account the best available information from the intelligence community. A group may be considered a terrorist organization even if it has not conducted terrorist operations in the past several years, but there is reason to believe it still has the capability and inclination to conduct such operations.

House Conference Report, H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 (Leg. Hist.), P.L. 101-649, Immigration Act of 1990.

C. Factors Defining Terrorism

The problem of defining terrorism exists on three levels. First, what acts may be characterized as terrorist acts? Certain activities, such as protected free speech, would not be characterized as terrorism even if they were motivated by a desire to cause terror. Second, what motivation is needed for an act, which might otherwise be merely criminal, to be labeled terrorism? Finally, which acts will not be considered terrorism because the perpetrators were engaged in legitimate military activity? We would not, for example, condemn as terrorists those French resistance fighters who sabotaged Nazi military trains. Similarly, there are conflicts which exist today where one side might be fighting a non-conventional guerilla war. Surely, all such combatants will not be labeled terrorists simply because they lack the wherewithal to fight a modern, "honorable" war. To fashion a workable definition of terrorism, we must examine each of the above facets.

1. The Terrorist Act

The types of activity which may be labeled terrorism are set forth in the Immigration and Nationality Act. Section 212(a)(3)(B)(ii) of the Act provides as follows:

> (ii) "Terrorist activity" defined-As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the

United States or any State) and which involves any of the following:
(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18) or upon the liberty of such a person.
(IV) An assassination.
(V) The use of any--
(a) biological agent, chemical agent, or nuclear weapon or device, or
(b) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
(VI) A threat, attempt, or conspiracy to do any of the foregoing.

Thus we see that to be a terrorist act, the act must be unlawful - - either under the laws of the place where it was committed or under the laws of the United States or any state. Second, the act must involve violence or the use of force against persons and/or property.

2. The Motivation for the Act

Not every violent criminal act is terrorism. Some acts, such as hijacking or sabotage of an airplane, are considered terrorism regardless of the perpetrator's motivation. *See*

section 212(a)(3)(B)(ii)(I) of the act. Other acts, such as kidnapping, are terrorism when they are committed "in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for release of the individual seized or detained". Section 212(a)(3)(B)(ii)(II) of the Act. In other alleged acts of terrorism, the feature that elevates an act from an ordinary criminal act to an act of terrorism is the motivation that purportedly inspired the act.

Federal law consistently adverts to the mental element of terrorism. Section 212(a)(3)(B)(V) of the Act specifies that a terrorist act must be one undertaken for "other than mere personal monetary gain". Section 2656f of the United States Code Title 22 states that terrorism must be "premeditated" and "politically motivated". The definition used by the Federal Bureau of Investigation describes terrorism as the unlawful use of force "to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives". *See* The Terrorism Research Center. (www.terrorism.com (1999). International terrorism is defined by 50 U.S.C.A. at section 1801(c) as an illegal, violent act that "appears to be intended - - (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping".

Whether there is political motivation is determined by the context in which the act occurs. There must be objective circumstances that make a claim of political motivation reasonable. *See e.g., Matter of S-M-J-*, Interim Decision 3303 (BIA 1997); *Matter of Dass*, 20 I & N Dec. 120 (BIA 1989). In construing 50 U.S.C.A. section 1801 (e), one federal court has stated that the definition of international terrorism

requires "findings of objective fact". *United States v. Megahey*, 553 F. Supp. 1180, 1196 (E.D.N.Y. 1982).

In order to distinguish an ordinary criminal act from an act of terrorism, then, we must examine the motivation for the act. Where the act is politically motivated, or where it is designed to intimidate or coerce a civilian population or a government, or where it is intended to influence the conduct of a government, an otherwise criminal act may be classified as terrorism.

3. The Target of the Act

Actions directed against civilians are more likely to be classified as terrorism. The Board of Immigration Appeals stated in another context that a "campaign of violence randomly directed against civilians represents acts of an atrocious nature out of proportion to the political goal of achieving a unified Ireland...." Matter of McMullen, 19 I & N Dec. 90, 97-98 (BIA 1984). A federal court also refused to consider as a political offense for the purpose of determining eligibility for asylum the bombing of a West Bank marketplace crowded with civilians by a Palestine Liberation Organization terrorist. The court distinguished between acts directed at civilians and those directed at a government, with only the latter type possibly being within the political offense exception of former sections 208(a) and 243(h)(c) of the Act. The definition of terrorism found in 22 U.S.C.A. section 2656f(d) provides that it is "politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience".[18]

---

[18] The U.S. Department of State interprets the term "noncombatant" to include, in addition to civilians, military

4. Summary

Unless specifically defined in the Act as terrorism, the following factors determine whether the terrorism provision under section 212(a)(3)(B) of the Act applies: (1) the nature of the Act - whether it was unlawful and violent; (2) the motivation of the Act - -whether there is a plausible context for a charge of terrorism; and (3) the target of the Act - - whether the victims were combatants or not.

D. Application of the factors defining terrorism to this case

Clearly the Respondent committed a terrorist act as defined by the Act. He used a firearm to endanger the safety of two individuals. *See* section 212(a)(3)(B)(V) of the Act. The terrorist act was unlawful in the place where it was committed. It unquestionably involved violence and the use of force.

Our discussion of the country conditions in Northern Ireland above shows that there is an objective basis for the finding that the terrorist act in this case had a political motivation. Northern Ireland engaged in a low - intensity civil war, euphemistically called "the Troubles", from 1969 to 1994, the longest and most sustained period of violence in Irish history. It resulted in the deaths of more than 3,000 people, two-thirds of which have been civilians, including members of para-military groups. Security forces have also incurred casualties. (Group Exhibit 6, "The Conflict in

---

personnel who at the time of the incident are unarmed or not on duty. U.S. Department of State, *Patterns of Global Terrorism*: 1998 (April 1999).

Northern Ireland - Cause, Consequences and Controls at 755-57). "Although the roots of the present conflict in Northern Ireland can be traced back some 300 years, the conflict in its present form is in fact "a tangle of interrclated questions" involving historical, religious, political, economic, and psychological elements". (*Id.* at 754). During this protracted struggle, violent, irredentist groups on all sides of the controversy evolved. (TR 772-73). These groups attracted followers who professed belief in their political objectives. Those who served these groups were motivated by these political objectives. The Respondent in this case was motivated by the political beliefs of INLA. It is a cruel insult to him to suggest that the cause for which he sacrificed so much was anything other than political.

The victim of the Respondent's terrorist act were civilian police officers. Violent assaults upon police have traditionally been viewed as contrary to the Geneva Convention on war (TR 770) and unlawful by civilized governments around the world. (TR 771 - 72). Even the Respondent's expert witness acknowledged as much. (TR 1122-24). It was this aspect of the Respondent's act that made it terrorism rather than a legitimate act of war. (TR 769, 897 - 902).

Acknowledging the distinction between combatants and non-combatants, the Respondent argued that the RUC should be considered a combatant since there is evidence of its responsibility for abuses of Catholics and collusion with loyalist para-military groups. Even the most stalwart defender of the RUC had to concede that there have been complaints regarding its conduct examined by the European Commission on Human Rights and the European Court on Human Rights; and that, in some cases, the RUC has been found at fault. (TR 863, 921-22). Amnesty International has criticized the RUC, particularly in the 1970's, for forcing prisoners to "make

confessions and using the evidence of confessions alone on which to base convictions". (TR 865, 867). Instances of collusion between certain members of the RUC and loyalist para-military groups have been documented. (TR 865).

But there is no evidence that any responsible human rights monitor has declared the RUC a combatant in the conflict in Northern Ireland. As discussed previously and graphically illustrated by the facts in this case, the RUC has at times itself been the victim of terrorism, losing as many as 300 of its ranks to violence. (TR 800). Homes of RUC officers containing their family members have been subjected to incendiary attacks. (TR 844). They have been the targets of violence by all sides in the conflict, called the "worst terrorist campaign experienced by any country in Western Europe". (TR 800). It does not condone the abuses of the RUC to find that, nevertheless, there is insufficient such evidence to brand the entire agency as a combatant in the Northern Ireland conflict.

To declare civilian police officers outside the protection of the law because of instances of abuse by a few is a sobering prospect. It would mean that every member of the RUC, no matter how innocent their personal conduct, would be considered a fair target for violence. Not even the Respondent's expert witness subscribed to this view. (TR 1122 - 24). It cannot possibly be done in the absence of evidence that the actions of the RUC have "been condemned by the international community as contrary to the basic rules of human conduct". *See Matter of A-G-*, 19 I & N Dec. 502 (BIA 1987).

The evidence requires consideration of the possibility of abuse of Catholic nationalists by the RUC. But the facts in this case do not prove that either Constable Elliot or

McPhearson were abusing a Catholic Nationalist or conspiring with a loyalist para-military group on that fateful day in Dungiven. These hapless officers had the misfortune of responding to a call to investigate a suspicious person, in keeping with the normal duties of policemen throughout the civilized world, when they were attacked without warning by four armed men. These assailants had intended to attack a four-man, British army foot patrol to steal their weapons. But when Constable McPhearson attempted to take one of their comrades into custody, they fired upon the Constables. This was not an act of self-defense of themselves or a third person threatened with deadly force, as the Respondent's expert witness mistakenly assumed. (TR 1124, 1149-51). It was not an act of war against a combatant in the Northern Ireland conflict. It was an ambush by assailants lying- in-wait upon two civilian police officers engaged in lawful activity. It was an act of terrorism.

E. "Engage in Terrorist Activity" Defined

As used in the Act, the term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity as determined in section 212(a)(3)(B)(ii) of the Act. We have already determined that the Respondent did commit a terrorist act as defined in section 212(a)(3)(B)(ii)(V) and (VI).

Even in cases Where the alien did not perform the terrorist act himself, Congress, as shown in the legislative history, meant to include those who planned, organized, financed, etc., terrorism. Abettors of terrorism can also be considered to have engaged in terrorist activity and can be charged under section 212(a)(3)(B)(iii) of the Act. In the case of bar, however, the Respondent engaged in terrorist activity because

he performed a terrorist act; he was not merely an abettor of terrorism.

3. FRAUD

The Respondent was excludable at the time of entry as an alien who had sought to procure an immigrant visa by fraudulently misrepresenting that he had never been arrested or imprisoned. *See* former sections 241 (a)(1)(A) and 212(a)(6)(c)(i) of the Act. The matters he concealed relating to his arrest and imprisonment determined his eligibility for the visa he sought. By falsely denying these facts he shut off a line of inquiry that might have resulted in denial of the visa on the merits of the issue. *See Matter of S-&B-C-*, 9 I & N Dec. 436 (BIA 1960; A.G. 1961). Concealment of criminal violations usually is material, especially if the offenses involve moral turpitude. *See Matter of N-*, 9 I & N Dec. 506 (BIA 1961). There was no credible evidence that the Respondent's failure to disclose these relevant facts was innocent.

The evidence in support of these three charges of deportability is clear, unequivocal and convincing. *See* 8 C.F.R. 240.46 (1998).

THE DECISION TO CERTIFY

Pursuant to 8 C.F.R. 3.1(c), the Immigration Court has decided to certify this case to the Board of Immigration Appeals for review of the Court's adjudications of the three issues regarding deportability. Both sides have been furnished notice of certification. *See* 8 C.F.R.3.7.

There are good reasons for certifying this matter. The issue regarding terrorism is one of first impression that can be

resolved administratively only with review by the Board of Immigration Appeals. Both sides have been afforded a full opportunity to present evidence and legal argument, including briefs, on this issue. A transcript of over one thousand pages has been prepared. The matter is properly formulated for appellate review.

Further litigation on the distinct and unrelated issues of relief from deportation will only add to the already heavy burden of expense, time, and work that both parties have undergone, without contributing any further enlightenment on the terrorism issue. It should be noted that approximately nine full business days of hearings and conferences have been required to reach this point. Both sides have borne the burden of bringing witnesses from Northern Ireland and Great Britain. The expense and burden of this litigation strikes the Respondent particularly hard; anything that can be done to relieve the burden on the parties should be done. Thousands of more pages of transcript and more boxes full of exhibits that will have nothing to do with the terrorism issue will only make this already unwieldy record even harder to understand and handle.

Finally, guidance from the Board of Immigration Appeals on the issue of terrorism will contribute significantly to the course of future litigation, helping to simplify it and bring it to an ultimate conclusion. For if the Immigration Court's decision regarding the terrorism issue is allowed to stand, it will greatly reduce the relief available to the Respondent and very likely bring this matter to an end, without further vexatious litigation. Guidance from the Board of Immigration Appeals on this weighty issue will serve that purpose not only in this important case, in which the issue has been well - developed by the parties, but in many others that may arise in the future.

INTERLOCUTORY ORDERS

ORDER: The Respondent's motion to terminate the charge of deportability brought pursuant to former sections 241(a)(1)(A) and 212(a)(6)(C)(i) of the Act is denied.

ORDER: The Respondent's motion to terminate the charge of deportability brought pursuant to former sections 241(a)(l)(A) and 212(a)(3)(B)(i)(l) of the Act is denied.

ORDER: The Respondent's motion to terminate the charge of deportability brought pursuant to former sections 241(a)(4)(B) and 212(a)(3)(B)(iii) of the Act is denied.

September 9, 1999 /s/ _____
Date Craig DeBernardis
Immigration Judge